UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

Mx North
346
Reference Only

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1938_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

EX-OFFICIO MEMBERS.

Right Hon. Sir D. B. Somervell, K.C., M.P.	Attorney-General.
Sir T. J. O'Connor, K.C., M.P. . .	Solicitor-General.
Sir F. E. J. Smith . .	President of the Law Society.

ELECTED MEMBERS.

Chairman—F. P. M. Schiller, Esq., K.C., Inner Temple.

Vice-Chairman—Sir Herbert Cunliffe, K.C., Lincoln's Inn.

G. Stanley Pott, Esq.	Law Society.
W. E. Vernon, Esq. (the late)	Middle Temple.
Sir Joshua Scholefield, K.C.	
G. Dudley Colclough, Esq.	Law Society.
Meyrick J. L. Beebee, Esq.	Inner Temple.
J. H. Stamp, Esq.	Lincoln's Inn.
W. Trevor Watson, Esq., K.C.	Gray's Inn.
J. D. Cassels, Esq., K.C.	Bar Council.
H. J. Wallington, Esq., K.C.	Gray's Inn.
H. B. Vaisey, Esq., K.C.	Bar Council.

Secretary—P. Noble Fawcett, Esq.,
13, Serjeants' Inn, Temple, London, E.C.4.

1938.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR - - - A. F. TOPHAM, K.C.

REPORTERS:

Court of Appeal - - - -	R. F. STUBBING, J. RITCHIE,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts; and Railway and Canal Commission Cases.	W. L. L. BELL, F. PORTER FAUSSET, G. F. L. BRIDGMAN, T. W. MORGAN, J. W. HALL, A. W. GRANT,	*Barristers-at-Law.*

1938—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 13, SERJEANTS' INN,
TEMPLE, LONDON, E.C. 4,
AND
PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1938.

Lord Maugham, Lord Chancellor.
Lord Hewart, Lord Chief Justice of England.
Sir W. A. Greene, Master of the Rolls.

Sir F. B. Merriman,	President of the Probate, Divorce, and Admiralty Division.
Sir F. A. Greer,* Sir Henry Slesser, Sir L. F. Scott, Sir F. D. MacKinnon, Sir A. C. Clauson, Viscount Finlay, Sir A. F. C. C. Luxmoore, Sir Rayner Goddard, Sir H. du Parcq,	Lords Justices of the Court of Appeal.

* Resigned, October 21, 1938.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1938.

Lord HEWART, Lord Chief Justice of England, President,
Sir GEORGE ARTHUR HARWIN BRANSON.
Viscount FINLAY.*
Sir JOHN ANTHONY HAWKE.
Sir ERNEST BRUCE CHARLES.
Sir TRAVERS HUMPHREYS.
Sir MALCOLM MARTIN MACNAGHTEN.
Sir HERBERT DU PARCQ.†
Sir RAYNER GODDARD.*
Sir GEOFFREY LAWRENCE.
Sir CYRIL ATKINSON.
Sir JOHN SINGLETON.
Sir WALTER GREAVES-LORD.
Sir GEORGE MALCOLM HILBERY.
Sir WILFRID HUBERT POYER LEWIS.
Sir FREDERIC JOHN WROTTESLEY.
Sir FREDERICK JAMES TUCKER.
Sir CYRIL ASQUITH.
Sir ROLAND GIFFARD OLIVER.
Sir REGINALD POWELL CROOM-JOHNSON.
Sir WINTRINGHAM NORTON STABLE.

ATTORNEY-GENERAL.

Sir DONALD BRADLEY SOMERVELL.

SOLICITOR-GENERAL.

Sir TERENCE JAMES O'CONNOR.

* Appointed Lords Justices of Appeal, October 12, 1938.

† Appointed a Lord Justice of Appeal, October 24, 1938.

ERRATA.

page	*line*	*for*	*read*
66	8 from bottom	*Archer* v. *Jones*	*Archer* v. *James*
206	6 ,, ,,	*Quarman* v. *Bennett*	*Quarman* v. *Burnett*
499	1	a capital nature	an income nature
701	headnote, 11	*Burtell*	*Bartell*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1938, will be as follows :—

In the First Series,
[1938] Ch.

In the Second Series,
[1938] 1 K. B. [1938] 2 K. B. [1938] P.

In the Third Series,
[1938] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME

A. PAGE

A. A. Sites, Ld., Pratt *v.* 459
Agricultural Holdings Act, 1923, In re. Dunstan *v.* Benney (C. A.) 1
Allen *v.* Hornchurch Urban District Council 654
Allen *v.* Trehearne (Inspector of Taxes) (C. A.) 464
Arthur Ryan Automobiles, Ld., Attorney-General *v.* (C. A.) 16
Associated Distributors, Ld. *v.* Hall (C. A.) 83
Att.-Gen. *v.* Arthur Ryan Automobiles, Ld. & Ryan (Arthur Stanley) (C. A.) 16
Att.-Gen. *v.* Canter 826
Att.-Gen. *v.* Prossor (C. A.) 531

B.

Banco de Bilbao *v.* Rey (C. A.) 176
Banco de Bilbao *v.* Sancha (C. A.) 176
Bank of America National Trust & Savings Association, Lloyds Bank, Ld. *v.* (C. A.) 147
Bantham Steamship Co., Ld., Kawasaki Kisen Kabushiki Kaisha *v.* (C. A.) 790

PAGE

Barnes, In re 684
Beard, Culver *v.* (C. A.) 292*n.*
Benney, Dunstan *v.* In re Agricultural Holdings Act, 1923. (C. A.) 1
Bernhard, The King *v.* (C. C. A.) 264
Black Sea & Baltic General Insurance Co., Ld., Reardon Smith Line *v.* The Indian City (C. A.) 730
Board of Control, The King *v.* Ex parte Winterflood (C. A.) 366
British Oak Insurance Co., Ld., Cross *v.* 167
British Salmson Aero Engines, Ld. *v.* Inland Revenue Commissioners (C. A.) 482
British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) (C. A.) 220
British Union for the Abolition of Vivisection, Tudor-Hart *v.* (C. A.) 329
Buckingham *v.* Counter. In re Counter's Petition (C. A.) 90
Butler, In re, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 210

C. PAGE

Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936. Butler, In re 210
Cammell, Laird & Co., Ld., Smith *v.* (C. A.) 700
Canter, Att.-Gen. *v.* 826
Cattle, Lewis *v.* 454
Clark, Yukon Consolidated Gold Corporation, Ld. *v.* (C. A.) 241
Commercial Union Assurance Co., Ld. *v.* Inland Revenue Commissioners 551
Cook, Son & Co. (St. Paul's), Ld., Pratt *v.* 51
Cottingham's Executors *v.* Inland Revenue Commissioners 689
Counter, Buckingham *v.* In re Counter's Petition (C. A.) 90
Counter's Petition, *In re.* Buckingham *v.* Counter (C.A.) 90
Cross *v.* British Oak Insurance Co., Ld. 167
Cull, Inland Revenue Commissioners *v.* (C. A.) 109
Cullington (Inspector of Taxes), United Steel Companies, Ld. *v.* 566
Culver *v.* Beard (C. A.) 292*n.*

D.

Da Costa, Ex parte. The King *v.* Howard 544
Daniel *v.* Rickett, Cockerell & Co., Ld. & Raymond 322
Daniels *v.* Vaux 203
Davies, Day *v.* (C. A.) 74
Day *v.* Davies (C. A.) 74
Dunstan *v.* Benney. In re Agricultural Holdings Act, 1923 (C. A.) 1

E.

Easterling *v.* Peek, Frean & Co., Ld. (C. A.) 300
Eva (Joseph) Ld. *v.* Reeves (C. A.) 393

PAGE

Evans, Hirschorn *v.* (Barclays Bank, Ld., Garnishees), (C. A.) 801
Equitable Investment Co., Ld., Mitchener *v.* 559

F.

Freeman, Hardy & Willis, Ld., Laycock (Inspector of Taxes) *v.* 836

G.

Gysin & Hanson, Hibernian Bank, Ld. *v.* 384

H.

Hackwood Estates Co., Ld., Shirvell *v.* (C. A.) 577
Hale, Sigley *v.* Wilson Third Party (C. A.) 630
Hall, Associated Distributors, Ld. *v.* (C. A.) 83
Harris (Inspector of Taxes), British Sugar Manufacturers, Ld. *v.* (C. A.) 220
Hibernian Bank, Ld. *v.* Gysin & Hanson 384
Hirschorn *v.* Evans (Barclays Bank, Ld., Garnishees) (C. A.) 801
Hornchurch Urban District Council, Allen *v.* 654
House & Property Investment Co., Ld. *v.* Kneen (Inspector of Taxes) 274
Howard, The King *v.* Ex parte Da Costa 544

I.

Indian City, The. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co., Ld. (C. A.) 730
Inland Revenue Commissioners *v.* British Salmson Aero Engines, Ld. (C. A.) 482
Inland Revenue Commissioners, Commercial Union Assurance Co., Ld. *v.* 551

PAGE

Inland Revenue Commissioners, Cottingham's Executors *v.* 689
Inland Revenue Commissioners *v.* Cull (C. A.) 109
Inland Revenue Commissioners, Lever Brothers, Ld. *v.* (C. A.) 518
Inland Revenue Commissioners *v.* Paget. Paget *v.* Inland Revenue Commissioners (C. A.) 25

K

Kawasaki Kisen Kabushiki Kaisha *v.* Bantham Steamship Co., Ld. (C. A.) 790
Kent County Council, Wardell *v.* (C. A.) 768
Kneen (Inspector of Taxes), House & Property Investment Co., Ld. *v.* 274

L.

Laycock (Inspector of Taxes) *v.* Freeman, Hardy & Willis, Ld. 836
Lever Brothers, Ld. *v.* Inland Revenue Commissioners (C. A.) 518
Lewis *v.* Cattle 454
Lloyd (A.) & Sons, Ld., Phillips *v.* (C. A.) 282
Lloyds Bank, Ld. *v.* Bank of America National Trust & Savings Association (C. A.) 147

M.

Mitchener *v.* Equitable Investment Co., Ld. 559

O.

Oxford City Council, Oxfordshire County Council *v.* (C. A.) 415
Oxfordshire County Council *v.* Oxford City Council (C. A.) 415

P. PAGE

Paget *v.* Inland Revenue Commissioners; Inland Revenue Commissioners *v.* Paget (C. A.) 25
Peek, Frean & Co., Ld., Easterling *v.* (C. A.) 300
Petros M. Nomikos, Ld. *v.* Robertson (C. A.) 603
Phillips *v.* Lloyd (A.) & Sons, Ld. (C. A.) 282
Poteliakhoff *v.* Teakle (C. A.) 816
Pratt *v.* Cook, Son & Co. (St. Paul's), Ltd. 51
Pratt *v.* A. A. Sites, Ld. 459
Prossor, Att.-Gen. *v.* (C. A.) 531

R.

Radcliffe *v.* Ribble Motor Services, Ld. (C. A.) 345
Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co., Ld. The Indian City (C. A.) 730
Reeves, Eva (Joseph), Ld. *v.* (C. A.) 393
Rex *v.* Bernhard (C. C. A.) 264
Rex *v.* Board of Control. Ex Parte Winterflood (C. A.) 366
Rex *v.* Howard. Ex parte Da Costa 544
Rey, Banco de Bilbao *v.* (C. A.) 176
Ribble Motor Services, Ld., Radcliffe *v.* (C. A.) 345
Rickett, Cockerell & Co., Ld. & Raymond, Daniel *v.* 322
Robertson, Petros M. Nomikos, Ld. *v.* (C. A.) 603
Ryan (Arthur) Automobiles, Ld. & Ryan (Arthur Stanley), Attorney-General *v.* (C. A.) 16

S.

Sancha, Banco de Bilbao *v.* (C. A.) 176
Shirvell *v.* Hackwood Estates Co., Ld. (C. A.) 577

PAGE
Shoesmith, In re (C. A.) 637
Sigley *v.* Hale. Wilson Third Party (C. A.) 630
Sites (A.A.), Ld., Pratt *v.* 459
Smith *v.* Cammell Laird & Co., Ld. (C. A.) 700
Stephens & Others Application, In re. In re The Unemployment Insurance Act, 1935 675
Sturminster Rural District Council, Trim *v.* (C. A.) 508

T.

Taylor *v.* Townend 198
Teakle, Poteliakhoff *v.* (C. A.) 816
Townend, Taylor *v.* 198
Trehearne (Inspector of Taxes), Allen *v.* (C. A.) 464
Trim *v.* Sturminster Rural District Council (C. A.) 508
Tudor-Hart *v.* British Union for the Abolition of Vivisection (C. A.) 329

U PAGE

Unemployment Insurance Act, 1935, In re. In re Stephens & Others Application 675
United Steel Companies, Ld. *v.* Cullington (Inspector of Taxes) 566

V.

Vaux, Daniels *v.* 203

W.

Wardell *v.* Kent County Council (C. A.) 768
Winterflood, Ex parte. The King *v.* Board of Control (C. A.) 366

Y.

Yukon Consolidated Gold Corporation, Ld. *v.* Clark (C. A.) 241

TABLE OF CASES CITED.

A.

		PAGE
Aga Khan *v.* Times Publishing Co.	[1924] 1 K. B. 675	329
Agriculture & Fisheries, Minister of *v.* Dean	[1924] 1 K. B. 851	2
Aksionairnoye Obschestvo A. M. Luther *v.* Sagor (James) & Co.	[1921] 3 K. B. 532	177
Alderman *v.* G. W. Ry. Co.	[1937] A. C. 454	350
Alexandria Water Co. *v.* Musgrave	11 Q. B. D. 174	228
Allester (David), Ld., In re	[1922] 2 Ch. 211	151
American Thread Co. *v.* Joyce	6 Tax Cas. 1	506
Anderton & Halstead, Ld. *v.* Birrell	[1932] 1 K. B. 271; 16 Tax Cas. 200	225
Aramayo, Ex parte. Rex *v.* Kensington Income Tax Commissioners	6 Tax Cas. 279	229
Archer *v.* James	(1859) 2 B. & S. 61; (1862) 2 B. & S. 67	59
Armour *v.* British International Pictures	23 B. W. C. C. 367	773
Att.-Gen. *v.* Ashton Gas Co.	[1904] 2 Ch. 621; [1906] A. C. 10	112, 113
—— *v.* Burges	Bunb. 223	829
—— *v.* Metropolitan Water Board	[1928] 1 K.B. 833	134
Austria (Emperor) *v.* Day & Kossuth	3 De G. F. & J. 217	191
Aylott *v.* West Ham Corporation	[1927] 1 Ch. 30	72

B.

B. Aerodrome, Ld. *v.* Dell	[1917] 2 K. B. 380	512
Bailey *v.* Geddes	[1938] 1 K. B. 156	396
Baines *v.* Swainson	4 B. & S. 270	153
Bank of Ethiopia *v.* National Bank of Egypt & Liguori	[1937] Ch. 513	177
Barnard *v.* Sully	47 Times L. R. 557	205
Bartell *v.* Gray (W.) & Co.	[1902] 1 K. B. 225	701
Bartonshill Coal Co. *v.* McGuire	3 Macq. 300	349
Bartonshill Coal Co. *v.* Reid	3 Macq. 266	349
Beasley *v.* Roney	[1891] 1 Q. B. 509	807
Bell *v.* National Provincial Bank of England	[1904] 1 K. B. 149; 14 Tax Cas. 413	836, 840
Bensaude *v.* Thames & Mersey Marine Insurance Co.	[1897] A. C. 609	613
Bettisworth's Case	2 Co. Rep. 31A	512
Bisgood *v.* Henderson's Transvaal Estates, Ld.	[1908] 1 Ch. 743	82
Black *v.* Dawson	[1895] 1 Q. B. 848	640
Bottomley *v.* Woolworth (F. W.) & Co., Ld.	[1932] W. N. 115	295
Bound *v.* Lawrence	[1892] 1 Q. B. 226	56
Bradbury *v.* English Sewing Cotton Co., Ld.	[1923] A. C. 744	131
Bristol & West of England Bank *v.* Midland Ry. Co.	[1891] 2 Q. B. 653	151
Britannic Merthyr Coal Co., Ld. *v.* David	[1909] 2 K. B. 146; [1910] A. C. 74	829, 832*n.*
British & Foreign Insurance Co. *v.* Sanday (Samuel) & Co.	[1916] 1 A. C. 650	616
Brooke *v.* Inland Revenue Commissioners	[1918] 1 K. B. 257	137

		PAGE
Brown *v.* Byrne	3 El. & Bl. 703	759
Bruce *v.* Caulfield	34 Times L. R. 204	583
Bryan *v.* Wetherhead	Cro. Car. 17	508
Budberg *v.* Jerwood	51 Times L. R. 99	153
Burdon *v.* Gregson & Co.	[1906] 2 K. B. 275	701
Burr *v.* Theatre Royal, Drury Lane, Ld.	[1907] 1 K. B. 544	350
Burrell & Son *v.* Leven	42 Times L. R. 407	816
Butler *v.* Butler	5 Ch. D. 554	18
Bwllfa & Merthyr Dare Steam Collieries (1891), Ld. *v.* Pontypridd Waterworks Co.	[1903] A. C. 426	428

C.

Campbell (Donald) & Co. *v.* Pollak	[1927] A. C. 732	294
Carras *v.* London & Scottish Assurance Corporation	[1936] 1 K. B. 291	610
Carringtons, Ld. *v.* Smith	[1906] 1 K. B. 79	563
Caterham Rural District Council *v.* Godstone Rural District Council	[1904] A. C. 171	415
Cavalier *v.* Pope	[1906] A. C. 428	578
Chapman *v.* Franklin	21 Times L. R. 515	819
Charles *v.* Taylor, Walker & Co.	3 C. P. D. 492	350
Chawner *v.* Cummings	8 Q. B. 311	59
Cheater *v.* Cater	[1918] 1 K. B. 247	578
Chester Corporation *v.* Briggs	[1924] 1 K. B. 239	654
Cockburn *v.* Smith	[1924] 2 K. B. 119	583
Coker *v.* Bolton	[1912] 3 K. B. 315	614
Cole *v.* North-Western Bank	L. R. 10 C. P. 354	153
Colman & Watson, In re	[1908] 1 K. B. 47	641
Constantinesco *v.* R.	11 Tax Cas. 730	482
Cook *v.* Imperial Tobacco Co.	[1922] 2 K. B. 158	295
—— *v.* North Metropolitan Tramways Co.	18 Q. B. D. 683	60
Coomber *v.* Berkshire Justices	9 App. Cas. 61	456
Coote *v.* Ford	[1899] 2 Ch. 93	18
Cork & Bandon Ry. Co. *v.* Goode	13 C. B. 826	58
Cory & Son, Ld. *v.* France, Fenwick & Co., Ld.	[1911] 1 K. B. 114	586
Cowan *v.* Milbourn	L. R. 2 Ex. 230	82
Crouch *v.* Credit Foncier of England, Ld.	L. R. 8 Q. B. 374	387
Crowhurst *v.* Amersham Burial Board	4 Ex. D. 5	583
Culver *v.* Beard	[1938] 2 K. B. 292	282, 292*n*.
Cunard *v.* Antifyre, Ld.	[1933] 1 K. B. 551	578
Cutts *v.* Ward	L. R. 2 Q. B. 357	61

D.

Dahl *v.* Nelson	*See* Nelson *v.* Dahl	
David *v.* Britannic Merthyr Coal Co.	[1909] 2 K. B. 146 nom. Britannic Merthyr Coal Co., Ld. *v.* David [1910] A. C. 74	829, 832*n*.
Davies *v.* Scott Lewis	[1918] W. N. 166	633
Desoutter Bros., Ld. *v.* Hanger (J. E.) & Co., Ld.	[1936] 1 All E. R. 535	487
Dewar *v.* Inland Revenue Commissioners	[1935] 2 K. B. 351; 19 Tax Cas. 561	468

		PAGE
Digby *v.* Financial News, Ld.	[1907] 1 K. B. 502	329
Dott *v.* Brown	154 L. T. 484	486
Dow *v.* M'Neill	1925 S. C. 50	772
Drummond *v.* Collins	[1915] A. C. 1011; 6 Tax Cas. 525	468
Dublin Corporation *v.* M'Adam	2 Tax Cas. 387	841
Duff Development Co. *v.* Kelantan Government	[1924] A. C. 797	188
Dunbeth, The	[1897] P. 133	739

E.

Edwards *v.* Roberts	19 Tax Cas. 618	468
Egan *v.* Langham Investments, Ld.	[1938] 1 K. B. 667	563*n.*
Enever *v.* The King	3 Commonwealth L. R. 969	456
Erskine *v.* Adeane	L. R. 8 Ch. 756	585
Evans & Glamorgan County Council, Arbitration between, In re	[1912] 76 J. P. 468	5
——— *v.* Bartlam	[1937] A. C. 473	282
——— *v.* Liverpool, Mayor of	[1906] 1 K. B. 160	780
——— Sons & Co. *v.* Cunard Steamship Co., Ld.	18 Times L. R. 374	731

F.

Fanton *v.* Denville	[1932] 2 K. B. 309	349
Farrer *v.* Lowe & Co.	5 Times L. R. 234	296
Farwell *v.* Boston & Worcester Railroad Corporation	4 Metcalf 49; 3 Macq. 316	349
Fisher *v.* Oldham Corporation	[1930] 2 K. B. 364	456
Flowers *v.* Chambers	[1899] 2 Q. B. 142	718
Foley *v.* Hill	2 H. L. C. 28	804
Franklin *v.* Neate	13 M. & W. 481	153
Frenkel *v.* MacAndrews & Co., Ld.	31 Ll. L. Rep. 92; [1929] A. C. 545	731, 746
Frere & Staveley Taylor & Co. & North Shore Mill Co., In re	[1905] 1 K. B. 366	641
Frost, In re	[1936] 2 All E. R. 182	640
Fry *v.* Salisbury House Estates, Ld.	[1930] A. C. 432	122
Fuentes *v.* Montis	L. R. 3 C. P. 268	153

G.

Gimson *v.* Inland Revenue Commissioners	[1930] 2 K. B. 246	113
Glynn *v.* Margetson & Co.	[1893] A. C. 351	731
Godstone Rural District Council *v.* Croydon Corporation	96 J. P. 271, 363; 48 Times L. R. 649	415, 422
Gold Fields American Development Co. *v.* Consolidated Gold Fields of South Africa, Ld.	[1926] Ch. 338	111
Goodson *v.* Baker	98 L. T. 415	820
Grant *v.* Langston	[1900] A. C. 383	210, 510
Green *v.* Berliner	[1936] 2 K. B. 477	562
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	228
Grey *v.* Pearson	6 H. L. C. 61	754
Gutsell *v.* Reeve	[1936] 1 K. B. 272	57
Gwilym *v.* Aberbeeg Collieries, Ld.	29 B. W. C. C. 273	304

H.

		PAGE
Hall *v.* Lees	[1904] 2 K. B. 602	780
Hamilton *v.* Inland Revenue Commissioners	[1931] 2 K. B. 495; 16 Tax Cas. 212	115, 120
Hamlyn & Co. *v.* Wood & Co.	[1891] 2 Q. B. 488	794, 808
Hammersmith (Berghem Mews) Clearance Order. In re Wilmot	157 L. T. 142	210
Hancock *v.* Smith	41 Ch. D. 456	806
Harrods, Ld. *v.* Tester	157 L. T. 7	805
Hartland *v.* Diggines	[1926] A. C. 289	114
Hayward *v.* Drury Lane Theatre	[1917] 2 K. B. 899	351
Hedley *v.* Pinkney & Sons Steamship Co.	[1894] A. C. 222	350
Hennell *v.* Inland Revenue Commissioners	[1933] 1 K. B. 415	555
Hewlett *v.* Allen & Sons	[1894] A. C. 383	57
Heyman *v.* Flewker	13 C. B. (N. S.) 519	153
Hickie *v.* Rodocanachi	4 H. & N. 455	626
Hillyer *v.* St. Bartholomew's Hospital Governors	[1909] 2 K. B. 820	770
Hobbs *v.* People Newspaper Publishing Co.	Times Newspaper, March 30, 1926	329
Hodsoll *v.* Stallebrass	11 A. & E. 301	19
Holt *v.* Hobson (Andrew) & Sons	23 B. W. C. C. 242	301
Hontestroom S. S. (Owners) *v.* S. S. Sagaporack (Owners)	[1927] A. C. 37	400
Hornchurch Urban District Council *v.* Webber	[1938] 1 K. B. 698	662, 663
Houlder Line *v.* Griffin	[1905] A. C. 220	701
Hutchinson *v.* York, Newcastle & Berwick Ry. Co.	5 Ex. 343	348
Hyams *v.* Coombes	28 Times L. R. 413	816
——— *v.* Stuart King	[1908] 2 K. B. 696	272, 816

I.

Indian Radio & Cable Communications Co. *v.* Bombay Presidency & Aden Income Tax Commissioner	[1937] 3 All E. R. 709	220
Inland Revenue Commissioners *v.* Blott	[1921] 2 A. C. 171	138
——— *v.* Longford (Countess of)	[1928] A. C. 252	534
——— *v.* Longman, Green & Co.	17 Tax Cas. 272	488
——— *v.* Melross	1935 S. C. 812	679
——— *v.* Pearson	[1936] 2 K. B. 533	111
——— *v.* Pratt	[1936] 2 K. B. 533	111, 112
——— *v.* Ramsay	20 Tax Cas. 79	486, 556
——— *v.* Westminster (Duke of)	[1936] A. C. 1	555
Inland Revenue Officer *v.* Ardross Estates Co.	1930 S. C. 487	675
——— *v.* Renfrewshire Assessor	1930 S. C. 345	678

J.

		PAGE
Jackson *v.* Rodger (A.) & Co.	1 F. 1053	711
——— *v.* Union Marine Insurance Co.	L. R. 10 C. P. 125	627
Jaques *v.* Steam Tug Alexandra (Owners)	[1921] 2 A. C. 339	61
Jenkins *v.* Usborne	7 Man. & G. 678	152
Joachimson *v.* Swiss Bank Corporation	[1921] 3 K. B. 110	806
Jupiter, The (No. 3)	[1927] P. 122	188

K.

Kaltenbach *v.* Mackenzie	3 C. P. D. 467	612
Kelly *v.* Wallis (John) & Son	24 B. W. C. C. Suppt. 204	18
Kenyon *v.* Darwen Cotton Manufacturing Co., Ld.	[1936] 2 K. B. 193	57
Kitchen *v.* Koch (C.) & Co.	[1931] A. C. 753; 23 B. W. C. C. 349; 24 B. W. C. C. 294	301, 303, 311
Koch *v.* Mineral Ore Syndicate (London & South Western Bank, Garnishees)	54 Sol. J. 600	805
Kronprinz (Owners of the Cargo) *v.* Kronprinz (Owners of the)	12 App. Cas. 256	18
Kulukundis *v.* Norwich Union Fire Insurance Society	[1937] 1 K. B. 1	614

L.

Lamb *v.* Attenborough	1 B. & S. 831	152
Lane *v.* Cox	[1897] 1 K. B. 415	593
Lanston Monotype Corporation, Ld. *v.* Anderson	[1911] 2 K. B. 1019	482
Last *v.* London Assurance Corporation	10 App. Cas. 438; 2 Tax Cas. 100	226, 230
Lecouturier *v.* Rey	[1910] A. C. 262	187
Leduc & Co. *v.* Ward	20 Q. B. D. 475	731
Lemmon *v.* Webb	[1895] A. C. 1	587
Lever Brothers, Ld. *v.* Kneale & Bagnall	[1937] 2 K. B. 87	640
Lewin *v.* End	[1906] A. C. 299	512
Lindsey County Council *v.* Marshall	[1937] A. C. 97	775
Lingley *v.* Firth (Thomas) & Sons, Ld.	13 B. W. C. C. 367	301
Lister *v.* Pickford	34 Beav. 576	512
Low *v.* Abernethy (James) & Co.	2 F. 722	711
Lowther *v.* Harris	[1927] 1 K. B. 393	153
Lumsden *v.* Burnett	[1898] 2 Q. B. 177	74
Luther (A. M.) *v.* Sagor (James) & Co.	[1921] 3 K. B. 532	177
Lyons *v.* Financial News	53 S. J. 671	334

M.

M'Carthy *v.* Abel	5 East, 388	613
Macdonald *v.* Tacquah Gold Mines Co.	13 Q. B. D. 535	801
McGregor *v.* Telford	[1915] 3 K. B. 237	547
Mackalley's Case	9 Co. Rep. 61B, 64A	457
Mackey *v.* Monks (James Henry) (Preston), Ld.	[1918] A. C. 59	701
MacTaggart *v.* Strump	10 Tax Cas. 17	490
Malayalam Plantations, Ld. *v.* Clark	19 Tax Cas. 314	841

		PAGE
Malmberg *v.* Evans & Co.	20 Ll. L. Rep. 40	757
Margetson *v.* Glynn	[1893] A. C. 351	754
Marshal *v.* Crutwell	L. R. 20 Eq. 328	806
Marshall *v.* Lindsey County Council	[1935] 1 K. B. 516; [1937] A. C. 97	773
Matthey *v.* Curling	[1922] 2 A. C. 180	278
Maynard *v.* Peter Robinson, Ld.	89 L. T. 136	60
Mellish *v.* Andrews	15 East, 13	616
Merrill *v.* Wilson	[1901] 1 K. B. 35	712
Mighell *v.* Sultan of Johore	[1894] 1 Q. B. 149	185
Mills *v.* Jones	14 Tax Cas. 769	482
Minister of Agriculture & Fisheries *v.* Dean	[1924] 1 K. B. 851	2
Monk *v.* Warbey	[1935] 1 K. B. 75	203
——— *v.* Whittenbury	2 B. & Ad. 484	152
Moorcock, The	13 P. D. 157; 14 P. D. 64	356
Moore *v.* Naval Colliery Co., Ld.	[1912] 1 K. B. 28; 5 B. W. C. C. 87	303
Moorsom *v.* Kymer	2 M. & S. 303	645
Morgan *v.* Liverpool Corporation	[1927] 2 K. B. 131	586
——— *v.* London General Omnibus Co.	13 Q. B. D. 832	60
——— *v.* Vale of Neath Ry. Co.	L. R. 1 Q. B. 149; 5 B. & S. 570	346, 349
Morrison *v.* Shaw, Savill & Albion Co.	[1916] 1 K. B. 747; [1916] 2 K. B. 783	739
Municipal Mutual Insurance Co. *v.* Policy Holders Journal	1923, July. Not Reported	333
Muir *v.* Hore	41 J. P. 471	461
Murphy *v.* Hurly	[1922] 1 A. C. 369	796

N.

National Bank *v.* Silke	[1891] 1 Q. B. 435	384
Nelson *v.* Couch	15 C. B. (N. S.) 99	18
——— *v.* Dahl	12 Ch. D. 568; Affd. nom. Dahl *v.* Nelson 6 App. Cas. 38	755
Neumann *v.* Inland Revenue Commissioners	[1934] A. C. 215; 18 Tax Cas. 332	109, 120
Noble *v.* Harrison	[1926] 2 K. B. 332	583
North Western Bank, Ld. *v.* Poynter Son & Macdonalds	[1895] A. C. 56	151
Nyberg *v.* Handelaar	[1892] 2 Q. B. 202	151
Nye *v.* Moseley	6 B. & C. 133	271, 272

O

O'Connor & Brewin's Arbitration, In re	[1933] 1 K. B. 20	4
Odessa, The	[1916] 1 A. C. 145	151
Official Assignee of Madras *v.* Mercantile Bank of India	[1935] A. C. 53	151
Oppenheimer *v.* Attenborough & Son	[1908] 1 K. B. 221	153
Owens *v.* Woosman	L. R. 3 Q. B. 469	296

P.

Panoutsos *v.* Raymond Hadley Corporation of New York	[1917] 2 K. B. 473	739
Parker *v.* Miller	42 Times L. R. 408	205
Paul (R. & W.), Ld. *v.* G. E. Ry. Co.	36 Times L. R. 344	587

		PAGE
Penman *v.* Fife Coal Co., Ld.	[1936] A. C. 45	57
Perrin *v.* Dickson	[1929] 2 K. B. 85; [1930] 1 K. B. 107; 14 Tax Cas. 608	490, 553, 556
Perry *v.* London General Omnibus Co.	[1916] 2 K. B. 335	298
Peru Republic *v.* Peruvian Guano Co.	36 Ch. D. 489	189
Peterborough Royal Foxhound Show Society *v.* Inland Revenue Commissioners	[1936] 2 K. B. 497	675
Petrel, The	[1893] P. 320; 62 L. J. (P.) 92	350, 355
Pickard *v.* Smith	10 C. B. (N. S.) 470	323
Pillar *v.* Llynvi Coal & Iron Co., Ld.	L. R. 4 C. P. 752	61
Plunkett *v.* Barclays Bank	[1936] 2 K. B. 107	804
Polurrian Steamship Co. *v.* Young	[1915] 1 K. B. 922	616
Pondicherry Ry. Co. *v.* Madras Income Tax Commissioner	[1931] L. R. 58 I. A. 239	220
Powell *v.* Streatham Manor Nursing Home	[1935] A. C. 243	396
Poyser *v.* Minors	7 Q. B. D. 329	648
Priestley *v.* Fowler	3 M. & W. 1	348
Prior, In re	43 Times L. R. 784	679

Q.

Quarman *v.* Burnett	6 M. & W. 499	206
Queenborough Corporation *v.* Sheppey Rural Council	[1915] 1 K. B. 356	430

R.

Raine *v.* Jobson & Co.	[1901] A. C. 404	707
Ramsay (J. & R.) *v.* Mackie	7 F. 106	708, 709
Rankin *v.* Potter	L. R. 6 H. L. 83	611
Reading Trust, Ld. *v.* Spero	[1930] 1 K. B. 492	561
Reeves *v.* Capper	5 Bing. N. C. 136	151
Reg. *v.* Cotham	[1898] 1 Q. B. 802	461
—— *v.* Farnborough	[1895] 2 Q. B. 484	272
—— *v.* Glynne	L. R. 7 Q. B. 16	544
—— *v.* Harrington	9 L. T. (N. S.) 721	544
—— *v.* Hemmings	4 F. & F. 50	268
—— *v.* Leppard	4 F. & F. 51	271
—— (Holywood) *v.* Louth County Justices	[1900] 2 I. R. 714	56
—— *v.* Machen	14 Q. B. 74	546
—— *v.* Wade	11 Cox, C. C. 549	268
—— *v.* Walton	9 Cox, C. C. 268	270
Rendel (A/S.) *v.* Arcos, Ld.	43 Com. Cas. 1	739
Rex *v.* Clayton	15 Cr. App. R. 45	268
—— *v.* Dymond	[1920] 2 K. B. 260	269
—— *v.* Hall	3 C. & P. 409	268
—— *v.* Kensington Income Tax Commissioners. Ex parte Aramayo	6 Tax Cas. 279	229
Richmond *v.* Branson & Son	[1914] 1 Ch. 968	192
Rigden's Executors *v.* Inland Revenue Commissioners	19 Tax Cas. 474	468
Robbins *v.* Jones	15 C. B. (N. S.) 221	578
Robertson *v.* French	4 East, 131	761
Robson *v.* Biggar	[1907] 1 K. B. 690	76

		PAGE
Rogers *v.* Whiteley	[1892] A. C. 118	808
Rose *v.* Ford	[1937] A. C. 826	357
Roura & Forgas *v.* Townend	[1919] 1 K. B. 189	603
Roux *v.* Salvador	3 Bing. (N. C.) 266	616
Russian Bank for Foreign Trade, In re	[1933] Ch. 745	188
Russian Commercial & Industrial Bank *v.* Comptoir d'Escompte de Mulhouse	[1925] A. C. 112	188
Rye & Eyre *v.* Inland Revenue Commissioners	[1935] A. C. 274	488
Rylands *v.* Fletcher	L. R. 3 H. L. 330	584

S.

Scoble *v.* Secretary of State for India	[1903] 1 K. B. 494; [1903] A. C. 299; 4 Tax Cas. 618	553, 556
Scottish Insurance Commissioners *v.* Edinburgh Royal Infirmary	1913 S. C. 751	775
Scottish Marine Insurance Co. of Glasgow *v.* Turner (James)	1 Macq. (H. L.) 334	613
Scottish Shire Line, Ld. *v.* Lethem	6 Tax Cas. 91; 1912 S. C. 1108	573
Secretary of State for India *v.* Scoble	[1903] A. C. 299; 4 Tax Cas. 618	553, 556
Sedgwick, Collins & Co. *v.* Rossia Insurance Co. of Petrograd	[1926] 1 K. B. 1	188
Sewell *v.* Burdick	10 App. Cas. 74	151
Sharp, In re	[1906] 1 Ch. 793	116
Shipstone & Sons *v.* Morris	14 Tax Cas. 413	840
Simbro Trading Co. *v.* Posograph (Parent) Corporation, Ld.	[1929] 2 K. B. 266	641
Simmons *v.* Heath Laundry Co.	[1910] 1 K. B. 543	770
Smith *v.* Associated Omnibus Co.	[1907] 1 K. B. 916	60
—— *v.* Jeffryes	15 M. & W. 561	759
—— *v.* Smith	[1925] 2 K. B. 144	18
—— *v.* Standard Steam Fishing Co., Ld.	[1906] 2 K. B. 275	719
Smith's Dock Co. *v.* Readhead (John) & Sons	[1912] 2 K. B. 323	578
Smithson *v.* Cage	Cro. Jac. 526	512
Société Anonyme Belge des Mines d'Aljustrel (Portugal) *v.* Anglo-Belgian Agency, Ld.	[1915] 2 Ch. 409	186
Spreckley *v.* Leicestershire County Council	[1934] 1 K. B. 366	5
Staffs Motor Guarantee, Ld. *v.* British Wagon Co.	[1934] 2 K. B. 305	153
Stevens *v.* Walker	[1936] 2 K. B. 215	282, 295
Stewart-Naylor *v.* London & Westminster Loan & Discount Co., Ld.	Unreported, December 20, 1937	562
Story *v.* Sheard	[1892] 2 Q. B. 515	829, 830
Strangways-Lesmere *v.* Clayton	[1936] 2 K. B. 11	771
Sutherland *v.* Stopes	[1925] A. C. 47	329
Sutro & Co. and Heilbut, Symons & Co., In re	[1917] 2 K. B. 348	739
Swan *v.* Pure Ice Co.	[1935] 2 K. B. 265	618

T.

Tasmania, The	15 App. Cas. 223	701
Tata-Hydro Electric Agencies, Ld., Bombay *v.* Income Tax Commissioner, Bombay Presidency & Aden	[1937] A. C. 685	229

		PAGE
Thomas *v.* Owen	20 Q. B. D. 225	512
Thompson *v.* Trust & Loan Co. of Canada	[1932] 1 K. B. 283	555
Thomson *v.* Clanmorris (Lord)	[1900] 1 Ch. 718	57
Tredway *v.* Machin	91 L. T. 310	796, 797
Trego *v.* Hunt	[1896] A. C. 7	841
Tuckwood *v.* Rotherham Corporation	[1921] 1 K. B. 526	18
Tunney *v.* Midland Ry. Co.	L. R. 1 C. P. 291	346
Tunno *v.* Edwards	12 East, 488	616
Turner *v.* Carlton	[1909] 1 K. B. 932	277
Tyrer & Co. *v.* Hessler & Co.	7 Com. Cas. 166	795

U.

Union Cold Storage Co. *v.* Adamson	16 Tax Cas. 293	227
United Kingdom Mutual Steamship Assurance Association *v.* Boulton	3 Com. Cas. 330	613, 614
United States Shipping Board *v.* Bunge y Born Ld.	31 Com. Cas. 118; 16 Asp. M. C. 429	739
——— *v.* Masters & Co.	14 Ll. L. Rep. 208	739

V.

Vallance, In re. Vallance *v.* Blagden	26 Ch. D. 353	272
Verner-Jeffreys *v.* Pinto	[1929] 1 Ch. 401	562
Vyse *v.* Wakefield	6 M. & W. 442	795

W.

Wade *v.* Simeon	2 C. B. 548	816
Wakefield Local Board *v.* West Riding Ry. Co.	30 J. P. 628	459
Walker *v.* Crystal Palace Football Club	[1910] 1 K. B. 87	772
——— *v.* Retter	[1911] 1 K. B. 1103	76
——— (A. W.) & Co. *v.* Inland Revenue Commissioners	[1920] 3 K. B. 648	230
Wallis, Son & Wells *v.* Pratt & Haynes	[1911] A. C. 394	612
Watson *v.* Petts	[1899] 1 Q. B. 54	640
——— Brothers *v.* Lothian	4 Tax Cas. 441	841
Weavings *v.* Kirk & Randall	[1904] 1 K. B. 213	701
Webb *v.* Stenton	11 Q. B. D. 518	812
Weiner *v.* Harris	[1910] 1 K. B. 285	153
West Hartlepool *v.* Durham County	[1907] A. C. 246	439
Western Assurance Co. of Toronto *v.* Poole	[1903] 1 K. B. 376	615
Westrup *v.* Equitable Investment Co.	Unreported, Nov. 12, 1937	561
White *v.* Granada Steamship Co.	13 Times L. R. 1	739
——— Child, & Beney, Ld. *v.* Eagle Star & British Dominions Insurance Co.	127 L. T. 571	177
Whitley Partners, Ld., In re	32 Ch. D. 337	69
Whitney *v.* Inland Revenue Commissioners	[1926] A. C. 37; 10 Tax Cas. 88	468
Wigmore *v.* Jay	5 Ex. 354	349

PAGE

Williams *v.* Grundy's Trustees . . [1934] 1 K. B. 524; 18 Tax Cas. 271 226
Wilmot, In re. Hammersmith (Berghem Mews) Clearance Order . . 157 L. T. 142 210
Wilsons & Clyde Coal Co. *v.* English . [1938] A. C. 57 . . . 351
Withers, In re . . . . . . [1930] 2 K. B. 192 . . . 639
Wolff *v.* Oxholm . . . . . 6 M. & S. 92 . . . 187
Woodhouse *v.* Inland Revenue Commissioners . . . . . . 20 Tax Cas. 673 . . . 468
Woodside *v.* Glove Marine Insurance Co. . . . . [1896] 1 Q. B. 105. . . 615
Wynne-Finch *v.* Chaytor . . [1903] 2 Ch. 475 . . . 653

Y.

Yarmouth *v.* France . . . . . 19 Q. B. D. 647 . . . 60
Yonge *v.* Toynbee . . . . . [1910] 1 K. B. 215 . . 640
Yorkshire Fire & Life Insurance *v.* Clayton . . . . . . 8 Q. B. D. 421 . . . 216
Yrisarri *v.* Clement . . . . 2 C. & P. 223 . . . 189

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

In re AGRICULTURAL HOLDINGS ACT, 1923.

DUNSTAN *v.* BENNEY AND OTHERS.

C. A.
1937
Nov. 19, 22.

Landlord and tenant—Agricultural holding—Notice to quit by landlord—Allegation that tenant not cultivating according to rules of good husbandry—Valuer immediately employed by tenant to examine holding in order to disprove allegation—Fee paid by tenant to valuer—No expenses incurred by tenant for sale or removal of goods—Claim by tenant for compensation for disturbance—Expense reasonably incurred by tenant in preparation of claim—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-ss.* 1, 6.

Under the Agricultural Holdings Act, 1923, the landlord of a holding served upon the tenant a notice to quit which stated that the tenant at the date of the notice was not cultivating the holding according to the rules of good husbandry. None of the other reasons mentioned in s. 12, sub-s. 1, of the Act why compensation for disturbance should not be payable to him was

C. A.

1937

AGRICULTURAL HOLDINGS ACT, 1923, *In re.*

DUNSTAN *v.* BENNEY.

alleged against the tenant. For the purpose of dealing with any claims which might be made each party appointed a valuer. On the termination of the tenancy by reason of the notice to quit the tenant quitted the holding, and made a claim to compensation for disturbance under the above mentioned sub-section. An arbitrator appointed to determine all claims between the parties stated a case for the opinion of the county court in which he found that at the date of the notice to quit the tenant was cultivating the holding according to the rules of good husbandry, and that the tenant did not incur any expense directly attributable to the quitting of the holding upon or in connection with the sale or removal of his property, but that he was liable to pay his valuer a fee for viewing the holding so as to enable him to prepare his claim for compensation for disturbance, and to disprove the allegation that he was not cultivating according to the rules of good husbandry :—

Held, by the Court of Appeal, affirming the decision of the county court judge, (1.) that the fee paid by the tenant to his valuer was an expense "reasonably incurred by him in the "preparation of his claim for compensation" within the meaning of s. 12, sub-s. 6, and should be included in the compensation payable to the tenant under that sub-section, notwithstanding that the tenant had not incurred any other such loss or expense directly attributable to the quitting of the holding as was mentioned in that sub-section; (2.) that, as that fee did not exceed in amount one year's rent of the holding, the compensation payable should under s. 12, sub-s. 6, be computed at an amount equal to one year's rent of the holding.

Minister of Agriculture and Fisheries v. *Dean* [1924] 1 K. B. 851, referred to.

APPEAL from the County Court of Cornwall held at Helston on a special case stated by an arbitrator.

John G. Dunstan (hereinafter called "the landlord") was the landlord of the agricultural holding known as Part Budock Vean, and Elizabeth Annie Benney and others (hereinafter called "the tenants") were tenants thereof as personal representatives of F. G. Benney, deceased.

The tenants' tenancy of the holding was terminated on September 29, 1934, by a notice to quit served on them by the landlord, and on that day, in consequence of that notice, they quitted the holding. The notice to quit, which was dated July 7, 1933, stated that it was given for the reason that at the date thereof the tenants were not cultivating the holding according to the rules of good husbandry.

For the purpose of dealing with their respective claims arising out of the termination of the tenancy the landlord appointed Mr. T. Blamey as his valuer and agent and the tenants appointed Mr. J. V. Brewer as their valuer and agent.

The valuers at their first meeting agreed that all statutory notices and particulars should be deemed to have been respectively served and given.

The valuers agreed on all matters in question between the landlord and the tenants except the tenants' claim for compensation for disturbance under the Agricultural Holdings Act, 1923, s. 12, that claim being at all times repudiated by the landlord.

On June 24, 1936, pursuant to agreement between the parties, Mr. S. T. Button was appointed single arbitrator to determine all claims by either party against the other in respect of the holding.

The arbitrator stated a special case dated January 14, 1937, for the opinion of the county court, in which he stated that he found the following facts:—

That at the date of the notice to quit the tenants were cultivating the holding according to the rules of good husbandry; that the tenants did not incur any loss or expense directly attributable to the quitting of the holding upon or in connection with the sale or removal of their household goods, implements of husbandry, fixtures, farm produce, or farm stock on or used in connection with the holding; but that they were liable to pay Mr. Brewer a fee for viewing the farm so that he could be properly informed to enable him to prepare the tenants' claim for compensation for disturbance, which claim was not reduced into writing pursuant to the agreement, and they were further liable to pay Mr. J. Coad, licensed valuer, a fee for viewing the farm immediately after receipt of the said notice to quit and qualifying to give evidence that the allegation in the notice to quit that the tenants were not cultivating according to the rules of good husbandry could not be proved.

The question for the opinion of the court was whether or

C. A.
1937

AGRICULTURAL HOLDINGS ACT, 1923, *In re*. DUNSTAN *v.* BENNEY.

not the tenants were entitled to compensation for disturbance under s. 12 of the Act of 1923.

On March 9, 1937, the county court judge decided that the tenants were entitled to compensation for disturbance under that section, the amount of the compensation to be one year's rent of the holding.

The landlord gave notice of appeal dated March 23, 1937, from the decision of the county court judge to the Court of Appeal for an order that the said decision might be set aside and that it might be determined that the tenants were not entitled to compensation for disturbance under the said section, upon the grounds that it was under that Act a condition precedent to the right to recover such compensation that the tenants should have unavoidably incurred loss or expense directly attributable to the quitting of the holding and upon or in connection with the sale or removal of their household goods, implements of husbandry, fixtures, farm products or farm stock on or used in connection with the holding, whereas the arbitrator had found in the special case that the tenants had not incurred any such loss or expense.

Laski K.C. and *J. Lhind Pratt* for the landlord, appellant. The decision of the county court judge, holding that the tenants were entitled under the Agricultural Holdings Act, 1923, s. 12, sub-s. 1 (1), to compensation for disturbance, is wrong. It was laid down by the Court of Appeal in *Minister of Agriculture and Fisheries* v. *Dean* (2) that it was a condition precedent to the tenant's right to compensation for disturbance that he should prove that he has incurred some loss or expense of the kind indicated in s. 10, sub-s. 6, of the Agriculture Act, 1920, now s. 12, sub-s. 6, of the Act of 1923. Further, it was held in *In re O'Connor and Brewin's Arbitration* (3) that it was not sufficient to put in a claim for compensation for disturbance, but that particulars of such claim must also be given; and that decision was applied and followed in

(1) The material provisions of the Act are set out below in the judgments of the Lords Justices.

(2) [1924] 1 K. B. 851.

(3) [1933] 1 K. B. 20.

C. A.
1937

AGRICULTURAL HOLDINGS ACT, 1923, *In re.* DUNSTAN *v.* BENNEY.

Spreckley v. *Leicestershire County Council.* (1) In order to maintain a claim for compensation for disturbance the tenant must show that he has incurred one of the kinds of loss mentioned in s. 12, sub-s. 6, of the Act of 1923. In this case the tenants have failed to do so. They have not incurred such a loss by reason of their act in bringing a valuer on to the land in order to sustain a claim for compensation for which there is no other foundation. There must be a loss of the kind indicated in the sub-section before there can be a claim for compensation. The compensation payable to a tenant is stated in s. 12, sub-s. 6, to be in respect of two things, namely, first, loss and, secondly, expense. " Loss " is there defined to be such loss "directly attributable to the quitting of the "holding as the tenant may unavoidably incur upon or in "connection with the sale or removal of his household goods, "implements of husbandry, fixtures, farm produce or farm "stock on or used in connection with the holding." "Expense" is defined as that " reasonably incurred by him in the prepara-"tion of his claim for compensation." Compensation cannot be recovered in respect of such expense unless there is also some other loss directly attributable to the quitting of the holding. In the case of *In re an Arbitration between Evans and Glamorgan County Council* (2) Joyce J. held that a valuer's fee on the valuation of the farm stock prior to the sale was not an unavoidable expense of the sale. Before the tenants could obtain compensation for disturbance they had to rebut the allegation in the notice to quit that the land was not being cultivated according to the rules of good husbandry. A valuer called in to qualify as a witness in order to rebut that allegation comes within the decision of Joyce J. (2), which has just been mentioned. The fee of a valuer called in for that purpose is not correlated to the loss on quitting a holding; it comes within the qualifying fees attributable to the costs of the arbitration. If the decision of the county court judge is correct, a claim for compensation for disturbance on quitting the holding must always amount to one year's rent when the notice to quit has alleged a failure to cultivate according to the rules

(1) [1934] 1 K. B. 366.

(2) [1912] 76 J. P. 468.

of good husbandry, because the tenant will always employ a valuer to rebut that allegation. The expense of such expert evidence is not, however, connected with the claim for compensation for disturbance, and such expense is not reasonably incurred on a claim for compensation where that claim has not been put forward for more than a year after the expense was incurred. A tenant cannot reasonably incur an expense in meeting his landlord's defence at a time when a claim for compensation had not been put forward; and therefore in this case the tenant could not properly incur the expense of employing the valuer Coad immediately after receiving the notice to quit, in order to qualify to give evidence, before the tenants had a prima facie good claim for compensation.

C. H. Grundy for the tenants, respondents. The decision of the county court judge was right. The tenants are entitled to recover as compensation for disturbance under the Agricultural Holdings Act, 1923, s. 12, sub-s. 1, the amount of the fee paid by them to their valuer. Under that sub-section, where the tenancy terminates by reason of a notice to quit given by the landlord and in consequence the tenant quits the holding, then, unless for one or other of the reasons to the contrary which are specified in that sub-section, compensation for the disturbance is payable by the landlord to the tenant. In the present case the only one of these reasons which is alleged against the tenant why compensation for disturbance is not payable to them, is that stated by the landlord in the notice to quit, namely, that at the date of the notice the tenants were not cultivating the holding according to the rules of good husbandry. The first question thus is whether the tenants were at that date cultivating the holding according to the rules of good husbandry; and that question is answered by the finding of the arbitrator stated in the special case that the tenants were at that date cultivating the holding according to the rules of good husbandry. The tenants are not, therefore, disentitled to compensation for the disturbance for any of the reasons mentioned in that sub-section. The next question is whether by reason of the notice to quit and the consequent termination of the tenancy the tenants have incurred any such loss or expense as entitles them to compensation under s. 12, sub-s. 6. The tenants have by reason thereof incurred such loss or expense. Where, as here, the landlord by stating in the notice to quit that the tenant was not cultivating the holding according to the rules of good husbandry obliges the tenant to employ valuers in order to disprove that statement and to enable him to claim compensation, moneys paid for that purpose are "expenses "reasonably incurred by him in the preparation of his claim "for compensation" within the meaning of sub-s. 6. The fee payable by these tenants to their valuer clearly falls within that class of expenses. On the true construction of sub-s. 6 it is not a condition precedent to such expenses being included in the compensation payable under the section that the tenant should also have incurred the other kind of loss mentioned in the sub-section, namely, loss directly attributable to the quitting of the holding upon or in connection with the sale or removal of his property on or used in connection with the holding. Consequently, the tenants are entitled to compensation in respect of the fee payable to their valuer, notwithstanding that they may not have sustained loss on the quitting of the holding upon or in connection with the sale or removal of their property.

Laski K.C. replied.

GREER L.J. This is an appeal by the landlord from an order made by the judge of the county court at Helston, answering in favour of the tenants a question which was submitted to him by an arbitrator under the Agricultural Holdings Act, 1923. In order to decide the question raised it is necessary to look at the somewhat artificial provisions of the Act. Sect. 12, sub-s. 1, of the Act provides that: "Where the tenancy of a holding terminates by reason of a "notice to quit given by the landlord, and in consequence of "such notice the tenant quits the holding," then unless certain things happen one of which is that the tenant "was "not at the date of the notice cultivating the holding according "to the rules of good husbandry"; and unless the notice to quit states that it is given "for one or more of the reasons "aforesaid" then compensation for the disturbance is payable to the tenant. That is a technical rule which may sometimes produce injustice to the landlord, because he may be advised to omit, or through some inadvertence may have omitted, to state in his notice to quit what the ground of the notice is. We are not, however, troubled with that consideration in the present case, because the notice stated in so many words that the ground on which it was given was that the tenants, at the date thereof, that is at the date of the notice, were not cultivating the holding in question according to the rules of good husbandry. The question to be determined at a later date when the notice to quit expired would not be whether at that later date the tenants were in fact cultivating the farm according to the rules of good husbandry, but whether they were so cultivating it at the date of the notice. Then sub-s. 6 of s. 12 provides: "The compensation payable "under this section shall be a sum representing such loss or "expense directly attributable to the quitting of the holding "as the tenant may unavoidably incur upon or in connection "with the sale or removal of his household goods, implements "of husbandry, fixtures, farm produce or farm stock on or "used in connection with the holding, and shall include any "expenses reasonably incurred by him in the preparation of "his claim for compensation."

In the present case it was absolutely essential to the tenants that they should be prepared to meet the landlord's contention that at the date of the notice to quit they were not in fact cultivating this farm in accordance with the rules of good husbandry. What could be a more reasonable act on the part of the tenants than getting in an expert at that time to provide them with the means of meeting the landlord's allegation, which they would have to meet at the expiration of the notice? It would not have been reasonable to ask them to postpone taking the necessary measures until the expiration of the notice. Their only way of dealing with the notice to quit so as to enable them to meet after the expiration of the notice the case which it raised against them, was to act immediately by calling in a surveyor, the surveyor called in being a Mr. Coad, and by necessarily incurring the expense of doing so. In my judgment that was an expense which within the meaning of sub-s. 6 they unavoidably incurred, and also an expense which they reasonably incurred in the preparation of their claim for compensation. In this particular case the tenants' claim for compensation was fortunately limited to the payment of a fee to their valuer. It might well be that in some cases the tenant would have a claim for compensation by reason of loss on the sale or removal of his property and also a claim for compensation by reason of the expenses incurred in the preparation of that claim. In my judgment, the learned judge was quite right in the view he adopted.

I think it unnecessary to decide whether the costs of Mr. Brewer were reasonably incurred. It is sufficient to determine the whole of this case to decide that the costs of employing Mr. Coad were reasonably incurred, because, if they were, then the measure of the liability is stated in s. 12, sub-s. 6, of the Act at one year's rent. It appears also to have been stated by the learned judge to have been agreed that if any compensation was to be paid, it was to be a year's rent.

We have been treated to an interesting argument by Mr. Laski and his junior, Mr. Pratt, with a view to showing that no effect can be given to the words " or expense directly "attributable to the quitting of the holding," unless there is a case of some other kind. I cannot so read the section. The section when it uses the word " or," means " or," and not " and." I think that the expense which was incurred by the tenants here was an unavoidable expense, and was an expense reasonably incurred, and that a claim by the tenants for compensation in respect of it was a claim they were entitled to bring before the arbitrator and have decided by him. A curious verbal mistake appears to have been made by the arbitrator in a paragraph of the special case. He states there " The tenants did not incur any loss or expense "directly attributable to the quitting of the holding upon or "in connection with the sale or removal of their household "goods, implements," etc. I think that is to be taken to mean that they did not incur any loss or expense except as hereinafter stated, because otherwise it would be quite futile to state a case, unless with reference to the fees of Mr. Brewer and Mr. Coad. Then they say: "They however are liable "to pay Mr. Brewer a fee for viewing the farm so that he could "be properly informed to enable him to prepare the tenants' "claim for compensation for disturbance which claim was not "reduced into writing pursuant to the agreement . . . . and "they are further liable to pay Mr. John Coad . . . . licensed "valuer a fee for viewing the farm immediately after receipt "of the said notice to quit and qualifying to give evidence "that the allegation in the said notice to quit that the tenants "were not cultivating according to the rules of good husbandry "could not be proved." That notice was never withdrawn, and during the whole of the year which elapsed from the delivery of the notice until its expiration the notice was maintained by the landlord, and the tenants had in the circumstances to incur expense in the preparation of their claim for compensation, and that expense is sufficient, in my judgment, to bring into effect the provisions of s. 12, sub-s. 6.

For these reasons I think that the appeal fails and must be dismissed with costs.

SLESSER L.J. I am of the same opinion.

By sub-s. 1 of s. 12 of the Agricultural Holdings Act, 1923, it is provided that "Where the tenancy of a holding ter-"minates by reason of a notice to quit given by the landlord, "and in consequence of such notice the tenant quits the "holding," compensation for disturbance shall be payable by the landlord to the tenant in accordance with the provisions of the section, unless certain events happen, of which the first is that the tenant "was not at the date of the notice "cultivating the holding according to the rules of good "husbandry," and the notice to quit must state that it was given for that or one or some of the other reasons stated in the section. In accordance with that provision, the landlord in this case on July 7, 1933, duly gave to the tenant notice to quit for the reason "that at the date hereof you were not "cultivating the holding known as Part Budock Vean according "to the rules of good husbandry." If that contention of the landlord were sustained, it would follow that the tenant would lose the right to compensation which he otherwise possessed under sub-s. 1 of s. 12, and it is therefore necessary in the preparation of his claim that he should be able to deny that contention raised by the landlord, which, if true, would have the effect of defeating his claim.

By sub-s. 6 of the same section, the amount of compensation is defined. There it is stated that: "The compensation "payable under this section shall be a sum representing such "loss or expense directly attributable to the quitting of the "holding as the tenant may unavoidably incur," and there follow certain losses or expenses which the tenant may unavoidably incur directly attributable to the quitting of the holding: "in connection with the sale or removal of his "household goods, implements of husbandry, fixtures, farm "produce or farm stock on or used in connection with the "holding." Then follow these words: "and shall include "any expenses reasonably incurred by him in the preparation "of his claim for compensation (not being costs of an arbitration "to determine the amount of the compensation)." Now, in my opinion, had those latter words, which are the words to be considered in this case, not been included, there might have been some doubt as to what exactly would be the position of a person incurring an expense which would not be directly attributable to any of the matters specifically mentioned in the earlier limb of the sub-section, and therefore presumably would not have been losses or expenses within the meaning of the sub-section for which compensation was obtainable. But the Legislature has in terms provided that the losses or expenses shall include any expenses reasonably incurred by the tenant in the preparation of his claim for compensation, and as, in my opinion, as I have stated, the meeting of the landlord's contention that the tenant was not cultivating the holding according to the rules of good husbandry was a

C. A.
1937
AGRICULTURAL HOLDINGS ACT, 1923, *In re.*
DUNSTAN *v.* BENNEY.
Slesser L.J.

necessary part of the tenant's claim for compensation, as is found as a fact by the learned county court judge, it follows that it is a loss or expense within the meaning of sub-s. 6. The actual finding of the learned judge is this: "Without "Coad's evidence it would have been impossible to put "forward a claim for compensation."

I have only to add a word with regard to the one particular type of cost which is set out in sub-s. 6 within the brackets and which is an exception, the incurring of which would not therefore be included as an expense; that is the costs of an arbitration to determine the amount of the compensation. In my opinion, the right to compensation arises out of sub-s. 1. The measure of the compensation, the sum, as it is called in the sub-section, arises out of sub-s. 6. But there are cases where costs may be incurred not to determine whether a man has a right to claim compensation or not, but costs to determine, in the language of the section, "the amount of the "compensation." Two of these immediately occur to one. The first is this, that it is further provided, reading on in sub-s. 6, that for the purposes of this Act the sum shall "be "computed at an amount equal to one year's rent of the "holding, unless it is proved that the loss and expenses so "incurred exceed an amount equal to one year's rent of the "holding, in which case the sum recoverable shall be such as "represents the whole loss and expenses so incurred up to a "maximum amount equal to two years' rent of the holding." The claim, therefore, which involved costs, not only to support the claim, but to show that the amount of compensation should be more than one year's rent of the holding, albeit it could not be more than two, would be the costs involved to determine the amount of the compensation. Another illustration is to be found in sub-s. 8 of the same section, which provides that where the tenant holds two or more holdings and receives notice to quit, the compensation in certain cases, which I need not discuss, "shall be reduced by such amount "as is shown to the satisfaction of the arbitrator to represent "the reduction (if any) of the loss attributable to the notice "to quit by reason of the continuance in possession by the "tenant of the other holding or holdings." That sub-section also might raise questions which would involve expenses, being costs of an arbitration to determine the amount of the compensation.

In so far as the present costs are not to determine the amount of the compensation, but are reasonably incurred in the claim for compensation, they are costs and expenses within the meaning of sub-s. 6, and consequently in conformity with the decision of this Court in the case of *Minister of Agriculture and Fisheries* v. *Dean* (1), and the provisions of the statute itself, the tenants are entitled to a sum equivalent to one year's rent of the holding.

I agree that this appeal fails.

SCOTT L.J. I agree with the judgments which have been delivered, but I would like to add a word or two on the history of the section. It began in 1908, in the Agricultural Holdings Act of that year (8 Edw. 7, c. 28). By s. 11 of that Act it was provided that " Where—(*a*) the landlord of "a holding, without good and sufficient cause, and for reasons "inconsistent with good estate management, terminates the "tenancy by notice to quit," etc., " the tenant upon quitting "the holding shall, in addition to the compensation (if any) "to which he may be entitled in respect of improvements, and "notwithstanding any agreement to the contrary, be entitled "to compensation for the loss or expense directly attributable "to his quitting the holding which the tenant may unavoidably incur upon or in connexion with the sale or removal "of his household goods, or his implements of husbandry, "produce, or farm stock, on or used in connexion with the " holding." That was the whole of the provision at that stage, identical in effect with a portion of sub-s. 6 of s. 12 of the Act of 1923, but excluding the other critical words which are contained in sub-s. 6. They were introduced first in 1920, when, by the Agriculture Act of that year (10 & 11 Geo. 5, c. 76), the whole of s. 12, as it now stands in the Act of 1923, was, so far as I can see, passed in its present form. The addition to the provision about loss or expense in connection with the sale or removal, of words relating to expense in connection with the preparation of the claim, to my mind makes it clear that the Legislature then contemplated the necessity of the defendant incurring expense in order to make good his claim in the particular circumstances that might exist. Expense incurred by a tenant in preparing a claim for compensation on being served by the landlord with notice to quit based on allegations put forward by the landlord, but denied by the tenant, ought in reason to be regarded as an expense caused by the notice to quit. It is for that reason presumably that Parliament provided that it, too, should be regarded as a ground for compensation for disturbance, just as if it had been an actual expense on removal.

---

(1) [1924] 1 K. B. 851.

I may add that I am in entire agreement with the views of my brethren that those very general words "costs incurred "in the preparation of the claim" are apt to cover costs such as were incurred here.

My Lord Justice Greer thought that a paragraph of the special case must involve a slip. I am not myself satisfied that it does. It says: "The tenants did not incur any loss "or expense attributable to the quitting of the holding upon "or in connection with the sale or removal of their household "goods," etc. That, I think, refers to the category of disturbance referred to in the original Act and the earlier part of the present sub-s. 6. The special case goes on to say: "They, "however, are liable to pay" the fees in question, and I read that latter part as meaning that these other details of the expenses which the tenants claim are expenses incurred in the preparation of the claim. The paragraph does not in terms say so, but I read it in that way, and if it is read in that way, then there would seem to be no need to assume that there was any mistake in it. However, if there is any doubt, I should agree with Greer L.J. in reading the paragraph as subject to some minor verbal alteration in order to make that meaning clear.

Subject to my preceding observations, which to my mind make

AGRICULTURAL HOLDINGS ACT, 1923, *In re.*
DUNSTAN *v.* BENNEY.

it doubly clear that the intention of the Legislature was to include this class of costs as costs caused by the disturbance, I agree with what my Lords have said.

Appeal dismissed.

Solicitors for appellant: *A. J. Adams & Adams, for Coulter Hancock & Co., Truro.*

Solicitors for respondents: *Robbins, Olivey & Lake, for Nalder & Son, Truro.*

J. R.

C. A.
1938
Jan. 26.

ATTORNEY-GENERAL *v.* ARTHUR RYAN AUTOMOBILES, LIMITED, AND ARTHUR STANLEY RYAN.

Workmen's compensation—Workman injured in course of his employment—Employers' right to indemnity from third party for compensation paid to workman—Right to further indemnity for further compensation paid—Money paid into Court with a denial of liability—Plea of res judicata—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 30, *sub-s.* 2.

On June 29, 1936, M., an employee of the Post Office, was injured in the course of his employment by a vehicle driven by R., who was in the service of R., Ld. The Postmaster-General paid compensation to M. On January 6, 1937, the Attorney-General began an action, under s. 30, sub-s. 2, of the Workmen's Compensation Act, 1925, against R., Ld., and R., to recover the compensation paid to M. during the period from June 30, 1936, to January 1, 1937.

The defendants paid a sum of money into Court with a denial of liability, and on or about February 16, 1937, the plaintiff accepted the sum of money so paid in.

On April 9, 1937, the plaintiff made a further claim against the defendants for the sum of 18*l.* 13*s.* 1*d.*, being compensation paid by the Postmaster-General to M. for the period from January 2, 1937, to March 31, 1937. The defendants contended that the matter had already been settled by the previous action, and relied on the plea of res judicata. The county court judge decided that the plaintiff was prevented from suing for the said sum of 18*l.* 13*s.* 1*d.* by reason of what had happened in the earlier proceedings. The plaintiff appealed :—

Held, by the Court of Appeal, that each time a payment of compensation was made there arose a liability to pay indemnity under s. 30, sub-s. 2, of the Workmen's Compensation Act, 1925 ; and that the second action must go back to the county court to be tried.

Appeal from a decision of His Honour Judge Dumas sitting at Westminster County Court on July 9, 1937.

The action was brought by the Attorney-General under s. 75, sub-s. 1, of the County Courts Act, 1934, against Arthur Ryan Automobiles, Ld., and Arthur Stanley Ryan. The Attorney-General sought to recover, under s. 30, sub-s. 2, of the Workmen's Compensation Act, 1925 (1), compensation

---

(1) The Workmen's Compensation Act, 1925, s. 30 : "Where the "injury for which compensation "is payable under this Act, or any "scheme certified under this Act, "was caused under circumstances "creating a legal liability in some "person other than the employer "to pay damages in respect "thereof—

[Reported by F. R. R. Burford, Barrister-at-Law.]

C. A.
1938

ATTORNEY-GENERAL
v.
ARTHUR RYAN AUTOMOBILES, LD.

paid to Matthew James Mulquin, an employee of the Post Office, who had been injured by a vehicle driven by Arthur Stanley Ryan, the servant of Arthur Ryan Automobiles, Ld.

In a previous action between the same parties arising out of the same cause the defendants had paid a sum of money into Court with a denial of liability, and the plaintiff had accepted the sum. This second action was brought to recover further compensation paid to the injured workman. The defendants maintained that the plaintiff's claim was settled by the previous action, and said that they would rely on the plea of res judicata. They put in issue the questions whether Matthew James Mulquin did suffer injury by the accident as alleged, and whether they, the defendants, were guilty of any negligence.

The county court judge held that the plaintiff was prevented from suing to recover the further sum so paid as compensation by reason of what had happened in the earlier proceedings.

The plaintiff appealed.

Sir Terence O'Connor S.-G. and *J. P. Ashworth* for the plaintiff, the appellant. The case should go back to the county court judge for him to decide whether the respondent's driver was negligent. It can be dealt with under s. 30, sub-s. 2, of the Workmen's Compensation Act, 1925, by action. There was no arbitration in this case. The county court judge held that there was an obligation on the plaintiff to include all his claims in one action.

"(1.) The workman may take "proceedings both against that "person to recover damages and "against any person liable to pay "compensation under this Act or "such scheme for such compensa-"tion, but shall not be entitled to "recover both damages and com-"pensation; and

"(2.) If the workman has "recovered compensation under "this Act or such scheme, the "person by whom the compensa-"tion was paid, and any person "who has been called on to pay "an indemnity under section six "of this Act relating to liability in "case of workmen employed by "contractors, shall be entitled to "be indemnified by the person so "liable to pay damages as afore-"said, and all questions as to the "right to and amount of any such "indemnity shall, in default of "agreement, be settled by action, "or, by consent of the parties, by "arbitration under this Act."

The plaintiff could not have his future rights settled in the county court, owing to the limitations of the county court's jurisdiction: *Smith* v. *Smith.* (1)

The action, which was alleged to be res judicata, was not before the Court and could not be before the Court. Payment into Court with a denial of liability does not bring about a state of res judicata. Payment into Court is to prevent adjudication. *Coote* v. *Ford* (2); County Court Rules, Order XI., r. 1; Rules of the Supreme Court, Order XXII., r. 1.

[FARWELL J. referred to *The Owners of the Cargo of the "Kronprinz"* v. *The Owners of the "Kronprinz."* (3)]

Every payment of compensation gives rise to a separate cause of action: *Butler* v. *Butler* (4); *Nelson* v. *Couch.* (5) The respondents have relied on *Tuckwood* v. *Rotherham Corporation.* (6) But the remarks of Scrutton L.J. in that case, on which the respondents relied, were really obiter. Attention should also be paid to the remarks of Bankes L.J. (7) and Atkin L.J. (8)

The real issue has never been tried, and the case should go back to the county court to be tried there.

S. R. Edgedale for the defendants, the respondents. The question is whether there is one cause of action or several. There is no difficulty about dealing with the whole matter in one action. If the case had been dealt with by arbitration, there would have been an award dealing with the whole matter, subject to a review on change of circumstances.

The matter can just as well be disposed of in one action by a declaration that the defendants do indemnify the plaintiff against such sum as the plaintiff has been obliged to pay. Such declarations are habitually made: see *Kelly* v. *John Wallis & Son.* (9) If the defendants do not indemnify they can be sued under the declaration. The language of s. 30 of the Workmen's Compensation Act, 1925, clearly contemplates that liability and amount should be settled at the same time.

---

(1) [1925] 2 K. B. 144, 149.
(2) [1899] 2 Ch. 93, 99.
(3) (1887) 12 A. C. 256.
(4) (1877) 5 Ch. D. 554, 558.
(5) (1863) 15 C. B. (N. S.) 99, 108.
(6) [1921] 1 K. B. 526, 536.
(7) Ibid. 532.
(8) Ibid. 540.
(9) (1930) 24 B. W. C. C. Suppt. 204.

The liability must be settled in one action, and so therefore must the amount. The word "settled" denotes finality: *Tuckwood* v. *Rotherham Corporation.* (1)

The words "recover compensation" in s. 30 of the Act indicate one of two things that are necessary to make the cause of action complete, just as special damage does in an action for negligence. In such an action you can not sue for each item of special damage in separate proceedings. In the same way each payment of compensation cannot be claimed separately. *Hodsoll* v. *Stallebrass* (2) decides that where damage and wrong create the cause of action, there is only one cause of action for the whole loss. So here, where the payment of compensation and the wrong give cause of action, there is only one cause of action for the whole loss.

As the county court judge said, s. 30 of the Act puts the employer in the position of having similar rights against the third party wrongdoer as an insurance policy gives an employer against his insurance company. In the arbitration under the policy all rights would be settled in one arbitration.

SLESSER L.J. In this case the Attorney-General, acting under authority now given to him by s. 75, sub-s. 1, of the County Courts Act, 1934, sues the Arthur Ryan Automobiles, Ld., and Arthur Stanley Ryan, the first defendant being a limited company, and the second the driver of a motor vehicle (the servant of that company), as it is alleged, for the sum of 18*l.* 13*s.* 1*d.*, being compensation at the rate of 1*l.* 8*s.* 8*d.* a week from January 2, 1937, to March 31, 1937, paid by H.M. Postmaster-General on behalf of His Majesty to one Matthew James Mulquin, one of the servants of the Crown, who suffered by an accident arising out of and in the course of his employment on June 29, 1936, by the negligence of the second defendant, Ryan, the servant of the defendant company, in the driving of a motor vehicle.

The defence to that action raises the case that the plaintiff's claim was settled by an action in the same county court, brought in Court on January 6, 1937, and determined on or

---

(1) [1921] 1 K. B. 526.

(2) (1840) 11 A. & E. 301.

C. A.
1938

ATTORNEY-GENERAL v. ARTHUR RYAN AUTO-MOBILES, LD.

Slesser L.J.

about February 16, 1937, by acceptance of money brought into Court by the defendants. They also say that they will rely on the plea of res judicata, and they put in issue the question whether Matthew James Mulquin, the servant of the Post Office, did suffer injury by the accident as alleged, or whether the defendants were guilty of any negligence.

On that plea being raised, the learned county court judge, for reasons which are not altogether clear to me, because no complete report of his judgment has been made, decided that the plaintiff, the Attorney-General, was prevented from suing for 18*l.* 13*s.* 1*d.* by reason of what had happened in relation to the earlier proceedings on which the defendants relied. It is that question, and that question only, which comes before this Court.

The Solicitor-General argues that the plaintiff is entitled to bring his second action; and that, if he succeeds in establishing his case, bringing himself within the meaning of a section of the statute to which I will refer, he is entitled to judgment; and that this second action was prematurely stopped by the learned county court judge. The section in question on which the plaintiff relies is s. 30 of the Workmen's Compensation Act, 1925. He makes no claim under any general right at common law, or in any other way outside that particular section. He is bound to base his case on that section and on that section alone. It is important, therefore, to consider that section in order to see what it really says. It provides that: "Where the injury for which compensation "is payable under this Act . . . . was caused under circum-"stances creating a legal liability in some person other than "the employer to pay damages in respect thereof," then sub-s. 2 is: "If the workman has recovered compensation "under this Act . . . ., the person by whom the compensation "was paid . . . . shall be entitled to be indemnified by the "person so liable to pay damages as aforesaid, and all questions "as to the right to and amount of any such indemnity shall, "in default of agreement, be settled by action . . . ."

The plaintiff's original case, which was stated in his particulars of claim of January 6, 1937, was that compensation was payable in respect of the injuries of Mulquin under the

Workmen's Compensation Act; and the amount then was stated to be 38*l.* 4*s.* 6*d.*, being at the rate of 1*l.* 8*s.* 8*d.* a week from June 30, 1936, to January 1, 1937. That was compensation which it was alleged was paid, and in fact had been paid without any arbitration. Next it was said that it was paid under circumstances "creating a legal liability in some person "other than the employer," that is the Postmaster-General; and that is particularized by saying that the injury was caused by the negligence of Ryan, the servant of the defendants, acting on their behalf. Next it is said that he did in fact recover compensation under the Act to the extent of 38*l.* 4*s.* 6*d.* and was paid. If those allegations could be sustained, the plaintiff would be entitled to be indemnified by the defendants, the amount of indemnity to be settled by action. The action, however, never came on for hearing, because on February 12, 1937, the plaint having been on January 6, 1937, the defendants gave notice of payment into Court of the total sum, and a certain sum for costs; and further gave notice that, notwithstanding such payment, the defendants denied liability. That brought the first action to an end; the Attorney-General took the money out of Court, and there was no further matter to be decided between the parties. But when the plaintiff proceeded, on April 9, 1937, to make a claim for 18*l.* 13*s.* 1*d.*, being at the rate of 1*l.* 8*s.* 8*d.* a week from January 2, 1937, to March 31, 1937, both dates inclusive, alleging that that money had been paid to the workman as compensation, and claimed under s. 30 an indemnity in respect of that sum, that further claim in my judgment was a separate action. The language of the section makes it quite clear to my mind that the condition on which the indemnity arises is primarily that the workman has been paid. That payment must be in respect of compensation under the Act, and the injury must be caused in circumstances creating a liability in some person other than the employer. But the actual claim arises only when the payment is made in fact; and each payment gives rise to a separate right of action, which will succeed or will not succeed according to whether the conditions laid down in the section are or are not satisfied.

Apart from the natural conclusion which arises from a consideration of the words, any other view would create a most extraordinary position. Under the Workmen's Compensation Act a workman's right to compensation depends upon a number of circumstances. The amount of it may vary from time to time according to the extent of the workman's disability. It may well be that, after the accident has occurred, he will temporarily recover. Owing to causes which I need not enter into here, changes of circumstances of various sorts may arise which may vary the liability. In any event, it is quite impossible for an employer paying compensation to predict and to assess what sum will be required under the Act from him in future. If Mr. Egdedale's argument be correct, once an employer has been paid indemnity for the sum actually paid by him, he can never recover any more money at all—albeit he has to pay more to the workman. It would seem, if that argument be right, that a wise employer would wait until the man was dead before he started any proceedings at all, or at any rate until he was so certainly recovered that there could never be a recrudescence of his injury, which in the present state of medical science will often be a difficult period to predict. The more reasonable, and I think proper, view as I say is that each time there is a payment, there arises a liability to pay indemnity, if the conditions are satisfied.

The judge has said in his judgment that it is in the public interest that there should be an end of litigation. That reference seems to me to have been made on the assumption that there was only one action to be brought in this case. Speaking for myself, I do not think that the learned judge intended to base his decision on any question of res judicata at all. On that, of course, I can only speculate, because I have not got the complete judgment. But Mr. Edgedale concedes that, if the right view be here that there are separate causes of action, the action for 18*l.* 13*s.* 1*d.* has never been tried. Once it is decided that this is a separate cause of action, it is clear to my mind that the whole question is now open for determination in the county court. It is open to Mr. Edgedale to show that his client was not negligent, as he pleads in his defence. The case must go back in order that it may be tried. This appeal must be allowed, with costs.

SCOTT L.J. I agree; and I only want to add very little to the judgment which has been delivered. Counsel for the respondents dealt in rather an indefinite way with the argument that it would be inconvenient should the law be that which my Lord has just declared it is. I see no inconvenience at all which can result from that interpretation of the law. If the third party says that he was not negligent, he can raise that issue on the first claim for indemnity made under the section. If that issue is decided in his favour, he will then, if the claim is renewed on a further payment being made, be entitled to set up the plea of res judicata, that the issue has already been decided inter partes between him and the employer, and that there was no negligence of his which was responsible for the accident. There will be then an end of his liability to make indemnity. On the other hand, if it is decided that he was negligent, that issue will have been decided once and for all between the employer and him. The only question of liability that the third party will thereafter be entitled to raise will be in connection with the payments by the employer to the workman on any suggestion that the payment made at any subsequent date was not a payment in accordance with the provisions of the Workmen's Compensation Act. Otherwise—and this is the ordinary case—it will be simply a question of ascertaining what was the amount that became payable at subsequent dates and was paid pursuant to the words of s. 30, sub-s. 2, by the employer to the workman. If that is the procedure contemplated by the section, there is no inconvenience that can attend upon the decision that we have given. It is perfectly simple. In my view the provisions of the section are the only provisions which could have been made conveniently for the purpose of enabling the employer to recover indemnity from the third party, for the simple reason that, under the Workmen's

Compensation Act, you can never tell in advance what will be the future liability to compensation falling upon the employer, and in respect of which the statute gives him the right of indemnity.

That being the right of action conferred by the section, the only other question is one of procedure. It is true that in the county court the claim is limited to 100*l.*: but for practical purposes, by reason of the operation of the doctrine of res judicata, it should normally be possible in the county court on the first occasion of a claim for indemnity to establish a right on the part of the employer to receive indemnity in respect of all future payments of compensation, just because he will always be able to rely upon the doctrine of res judicata.

That being so, the provisions of the section seem to me to be not only clear, but to cause no inconvenience in practice.

FARWELL J. I agree. I have only two words to add. The whole of this case in my judgment depends upon the true construction of this section, and nothing else. Once one comes to the conclusion to which I have come, that there is no cause of action in a case of this kind until a payment is made, it necessarily follows that on each payment being made a fresh cause of action arises. That is all I desire to say.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *The Solicitor to the Post Office; William Charles Crocker.*

F. R. R. B.

COMMISSIONERS OF INLAND REVENUE *v.* PAGET.

PAGET *v.* COMMISSIONERS OF INLAND REVENUE.

C. A.
1937
Dec. 1, 2, 3.
1938
Jan. 31.

Revenue—Sur-tax—Bearer bonds—Default in interest payments—Sale of coupons—Whether liable to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV.*

Miss Paget was the owner of bearer bonds of the City of Budapest. Interest payments in sterling were stopped by a decree of the Hungarian Government and the Municipality of Budapest was required to pay into the Hungarian National Bank an equivalent sum in pengos to the credit of a foreign creditors' fund, out of which holders might obtain payment of their interest coupons in pengos, subject to the proceeds being applied to certain purposes within Hungary.

Miss Paget was also the holder of certain bearer bonds of the Kingdom of Yugoslavia. In respect of these bonds the Government of Yugoslavia suspended payment in New York, offering holders the option of payment in dinars in Belgrade, subject to restrictions on the use to which the dinars could be put, or payment of 10 per cent. in dollars, and the issue of funding bonds for the remainder.

Miss Paget did not avail herself of any of these options, but sold to agents, at a discount, the coupons of both sets of bonds as they fell due.

The question to be determined was whether the gross sums received by Miss Paget during the year ending April 5, 1933, from the sale of the coupons of the City of Budapest bonds and the gross sums received by her during the year ending April 5, 1934, from the sale of coupons of the bonds of Yugoslavia respectively formed part of her total income from all sources for those two years, so as to render her liable to be assessed for sur-tax in respect of them.

The Special Commissioners decided this question in favour of the Crown in relation to the Budapest bonds and in favour of Miss Paget in relation to the Yugoslavia bonds. An appeal by the Crown and a cross-appeal by Miss Paget were taken to Finlay J., who decided both in favour of Miss Paget.

On an appeal to the Court of Appeal by the Crown in both cases :—

Held, as to both sets of bonds that the proceeds of sale were not income arising to Miss Paget either under Case IV. of Sch. D or under Sch. C, and did not fall to be included in her total income for the purposes of assessment to sur-tax.

Decision of Finlay J. [1937] 2 K. B. 711 affirmed.

APPEALS by the Crown from decisions of Finlay J. on a Case stated by the Special Commissioners of Income Tax. (1)

---

(1) [1937] 2 K. B. 711.

C. A.
1937

INLAND REVENUE COMMISSIONERS
v.
PAGET.
PAGET
v.
INLAND REVENUE COMMISSIONERS.

At a meeting of the Special Commissioners on January 22, 1936, the Hon. Dorothy Wyndham Paget appealed from two assessments to sur-tax in respect of the years ending April 5, 1933, and April 5, 1934. During those years Miss Paget was the holder of 4½ per cent. bearer bonds issued by the City of Budapest in the year 1914. The half-yearly interest coupons were payable in sterling in London, and in certain other countries in their respective currencies. By a decree dated December 22, 1931 (a translation of which was circulated to bondholders by the Department of Overseas Trade), the Royal Hungarian Government forbade the Municipality of the City of Budapest, while the decree remained in force (but without prejudice to the full rights of creditors after its expiry), to make payments of interest on the bonds to the creditors. The Municipality was directed to deposit with the Hungarian National Bank, as each payment fell due, the equivalent in pengos of the sum due. Provision was made for the formation of a foreign creditors' fund into which payments of pengos should be made, and for the control of the fund by the Hungarian National Bank. The decree was in force from December 23, 1931, to December 22, 1934.

After the decree came into force payment of interest coupons could be obtained in Hungary in pengos, but such payment could only be made out of the sums deposited by the City of Budapest pursuant to the decree to the credit of an account controlled by the Hungarian National Bank, and if required for certain specified purposes within Hungary. No such payment was obtained by Miss Paget.

A market existed in London for the sale of the interest coupons in question, and during the years of assessment ending April 5, 1933, and April 5, 1934, Miss Paget made sales of interest coupons through agents or coupon dealers in London amounting to 1172*l.* 10*s.* gross and 1554*l.* 7*s.* 8*d.* gross respectively. The purchasers deducted income tax from the proceeds of sale on payment to Miss Paget.

During the year of assessment ending April 5, 1934, Miss Paget was also the holder of 7 per cent. bearer bonds of the Kingdom of Yugoslavia issued in 1922, the half-yearly interest coupons being payable in American dollars in New York. On July 24, 1933, the Government of Yugoslavia expressed to the bondholders its inability to pay interest on the bonds in full, and put before the bondholders a scheme for meeting the coupons falling due from November 1, 1932, to May 1, 1935, both dates inclusive, under which holders might accept either—

(*a*) a payment of each coupon in dinars in Belgrade, the disposal and use of such dinars to be governed by the general legislative or regulatory provisions of the Kingdom of Yugoslavia from time to time in force regarding transactions in moneys and foreign exchange; or

(*b*) the payment of 10 per cent. of the face value of each coupon in American dollars, and the issue of funding bonds for the remainder.

In September, 1933, Miss Paget sold the interest coupons of her bonds falling due for payment on November 1, 1932, and May 1, 1933, through agents or coupon dealers in London. The nominal amount of the coupons was $7000, and the amount realized on sale was $3587.50 or 760*l.* 1*s.* 3*d.* The coupon dealers deducted income tax from the proceeds of sale and the net amount was credited to Miss Paget's bank account in Montreal.

It was contended on behalf of Miss Paget: (*a*) That no interest arose from any of the bonds in either of the years of assessment: (i.) as regarded the Budapest bonds, the deposit of pengos with the Hungarian National Bank by the Municipality was not a payment to her; (ii.) as regarded the Yugoslav bonds, Miss Paget had not accepted the offer of the Yugoslav Government, and no payment had been made by that Government. (*b*) That the proceeds of the sales of coupons were not interest, but merely the price of the expectancy of interest, and were not income of Miss Paget. (*c*) That the proceeds of the sale of the coupons did not arise to Miss Paget from bonds, but from contracts of sale. (*d*) That Miss Paget was not liable to pay or bear income tax on the proceeds of the sales of coupons under Sch. C or Sch. D or at all, and therefore such proceeds did not form part of her income for the purposes of sur-tax.

C. A.
1937

INLAND REVENUE COMMISSIONERS v. PAGET.
PAGET v. INLAND REVENUE COMMISSIONERS.

It was contended on behalf of the Crown that the proceeds of the sale of the coupons were income and fell to be included in the assessments appealed against as income of Miss Paget.

The Commissioners gave the following decision in writing: "We hold the 4½ per cent. City of Budapest bonds are "instruments subject to Hungarian law, and capable of being "affected by the decrees of the Hungarian Government. In "our opinion the deposit of pengos with the Hungarian "National Bank in accordance with the decree constituted "performance by the Municipality of its obligation to pay "interest on the bonds, and the proceeds of the coupons "falling due at the respective dates of deposit represent "interest to the appellant must be included in her return of "total income for the purposes of sur-tax. As regards the "7 per cent. bonds of the Kingdom of Yugoslavia, interest "coupons of which fell due for payment on November 1, 1932, "and May 1, 1933, we hold that there was default on the "part of the Yugoslav Government, and that the offer to pay "in dinars, or partly in United States dollars and partly in "funding bonds did not, in the absence of acceptance by "Miss Paget and payment to her, constitute performance or "satisfaction of its obligation. In our opinion the sale of "the coupons did not amount to an implied acceptance of "this offer, and the mere fact that the existence of the offer "gave some value to the coupons in the market did not cause "interest to arise. We therefore exclude this item from the "assessments for the years 1932–33 and 1933–34."

Both parties appealed.

FINLAY J. held as to both sets of bonds, that the proceeds of sale were not income arising to Miss Paget either under Case IV. of Sch. D or under Sch. C and did not fall to be included in her total income for the purposes of assessment to sur-tax.

The Crown appealed. The appeals were heard on December 1, 2 and 3, 1937.

Sir Donald Somervell A.-G., *J. H. Stamp*, and *R. P. Hills* for the Crown.

A. M. Latter K.C. and *F. Grant* for Miss Paget.

[The arguments fully appear from the judgments.]

Cur. adv. vult.

1938. Jan. 31. The following judgments were read :—

SIR WILFRID GREENE M.R. These appeals relate to certain assessments to sur-tax made upon the respondent, Miss Paget, in respect of the proceeds of sale of interest coupons sold by her in the circumstances hereinafter stated. The coupons in question were coupons for interest payable upon the bonds of two foreign loans which she held, and the facts relating to them are as follows: City of Budapest Loan. Miss Paget was the holder of certain 4½ per cent. bearer bonds issued by the City of Budapest. Attached to the bonds were coupons for interest which fell due for payment on July 1 and January 1 in every year. The coupons were payable in London in sterling and in certain foreign countries in the appropriate currencies.

By a decree of the Hungarian Government which came into force on December 23, 1931, for the period of one year and was afterwards continued in force until December 22, 1934, the City of Budapest was forbidden, while the decree remained in force "but without prejudice to the full rights "of the creditors after its expiry" to make payments of interest on the bonds direct to creditors, but was ordered to deposit equivalent sums in pengos (taken at an official rate of exchange) with the Hungarian National Bank. The decree provided that these sums were to be paid into a special fund (called the Foreign Creditors' Fund) to which alone coupons were to be presented for payment so long as the decree remained in force. The Hungarian National Bank in agreement with their adviser was to decide if and to what degree the coupons might be redeemed. After the decree came into force payment of the coupons could be obtained in Hungary in pengos out of the Foreign Creditors' Fund with the prior sanction of the Hungarian National Bank, but only if the money was required for certain specified classes of expenditure

C. A.
1938

Inland Revenue Commissioners v. Paget.
Paget v. Inland Revenue Commissioners.

Sir Wilfrid Greene M.R.

in Hungary. A market existed in London for the sale of these interest coupons, and during the years ending April 5, 1933, and April 5, 1934, Miss Paget sold interest coupons belonging to her bonds, the gross amounts realized being 1172*l.* 10*s.* in the former year and 1554*l.* 7*s.* 8*d.* in the latter year. The sales were effected in each case after the due date for the interest payment, and the price received was considerably less than the face value of the coupons. The sales were made in London through agents or coupon dealers, who, to quote the Stated Case, " deducted income tax from "the proceeds of sale on payment to Miss Paget." The meaning and effect of this finding by the Special Commissioners will be examined later in this judgment.

Kingdom of Yugoslavia Loan. Miss Paget was the holder of certain 7 per cent. bearer bonds issued by the Kingdom of Yugoslavia. Attached to the bonds were coupons for interest which fell due for payment on May 1 and November 1 in every year. The coupons were payable in New York in United States dollars. On July 24, 1933, the Government of Yugoslavia issued a circular letter stating that in view of its inability to secure sufficient foreign exchange it had been " obliged temporarily to interrupt service payments " on these and other bonds, and had decided to propose to the holders " certain temporary modifications." The letter stated that arrangements had been made to pay the six coupons maturing from November 1, 1932, to May 1, 1935, both inclusive by either of two methods at the holder's option—namely, by payment in dinars in Belgrade or by payment of 10 per cent. in dollars in New York and the balance in 5 per cent. funding bonds due November 1, 1956. In the case of payment in dinars the use to which the dinars might be put was to be governed by regulations from time to time in force in Yugoslavia. The acceptance of payment in dinars or of the 10 per cent. payment in dollars and funding bonds (as the case might be) was to " constitute full payment " of the coupons exchanged. In September, 1933, Miss Paget sold the interest coupons belonging to her bonds which fell due for payment on November 1, 1932, and May 1, 1933, the gross amount realized being $3587.50, equivalent to *760l.* 1*s.* 3*d.*, a sum considerably less than the face value of the coupons. The sales were made in London "through agents and coupon "dealers" who "deducted income tax from the proceeds of sale." The net sum was credited to Miss Paget's banking account in Montreal.

In assessments to sur-tax made upon Miss Paget for the years ending April 5, 1933, and April 5, 1934, respectively, there were included sums equal to the gross purchase price of the coupons which she had sold. It was sought to justify this assessment upon the ground that these sums were income in respect of which Miss Paget was liable to bear income tax either under Sch. C or under Case IV. of Sch. D. In the course of the hearing before us Mr. Hills stated that he proposed to rely on Case VI. of Sch. D and the provisions as to discounts in Case III. To this proposal Mr. Latter, on behalf of the respondent, objected upon the ground that no such contention had been raised below. We overruled the objection, but no argument was addressed to us by Mr. Hills in relation to either of these two alternatives and Mr. Latter was accordingly not called upon to deal with them. I mention this incident in order to place it upon record. The Special Commissioners decided against Miss Paget in the matter of the Budapest Loan, but in her favour in that of the Yugoslavian Loan. Both sides appealed. Finlay J. allowed Miss Paget's appeal, and dismissed that of the Commissioners of Inland Revenue, who now appeal to this Court with regard to both loans.

Before considering the questions which arise, it is essential to have a true view of the facts. Each of the debtors defaulted in the sense that for the period of suspension of interest it repudiated its obligations to pay interest in accordance with the provisions of the bonds, and endeavoured to substitute a different method of payment. If Miss Paget had received payment in pengos and dinars there can be no question that she would have received taxable income. But she did not. It was scarcely suggested on behalf of the appellants—and the suggestion in any case is ill-founded—that the possibility

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
PAGET.
PAGET
v.
INLAND REVENUE COMMISSIONERS.

Sir Wilfrid Greene M.R.

offered to Miss Paget of obtaining this income was income in respect of which she became liable to tax. The mere offer of income in substitution for the contractual interest cannot be income, and the finding of the Special Commissioners in the case of the Budapest Loan that the deposit of pengos "constituted performance by the Municipality of its obligation "to pay interest on the bonds" cannot be supported—indeed, the appellants made no attempt to support it.

The appellants' argument throughout was based on the proposition that the purchase price paid for the bonds was taxable income of Miss Paget. For the purpose of this argument it was irrelevant to inquire whether or not the coupon dealers or some purchaser from them actually obtained pengos or dinars—the appellants' argument would have been precisely the same if they had destroyed the coupons. Accordingly, the appellants made no attempt before the Special Commissioners to show receipt of anything from the debtors by the purchasers of the coupons, and there is, in consequence, no finding upon this point. Miss Paget can only be assessed to sur-tax in respect of the sums in question if they formed part of her income for income tax purposes. The first contention of the appellants was that the interest payable on the bonds was in each case payable out of "a "public revenue" within the meaning of Sch. C; that the coupon dealers who purchased the coupons were, under para. 7 (*d*) of the second set of rules as to interest contained in Sch. C, "persons intrusted with the payment" and were bound to deduct tax out of the purchase price of the coupons and pay it to the Revenue on behalf of Miss Paget; that the finding of the Special Commissioners to the effect that the coupon dealers deducted income tax was correct in fact and in law; and that the gross purchase price was "profit "arising" to Miss Paget "from interest" on the bonds and formed part of her income chargeable under Sch. C accordingly. This argument cannot, in my opinion, in any event apply to the Budapest Loan, since I am unable to agree with the proposition (which was but faintly advanced) that the interest on that loan is payable out of "public revenue." This argument, therefore, must be confined to the Yugoslavian Loan.

Now it is clear, as I have already pointed out, that Miss Paget received no interest on her bonds, and the argument is based upon what is said to be the effect of the machinery provisions of Sch. C relating to purchases of coupons by coupon dealers. These provisions, which afford a good example of ill-considered legislation only too common in income tax matters, require therefore careful examination. The argument was throughout conducted upon the footing that the coupons were purchased by the coupon dealers from Miss Paget, although the findings of the Special Commissioners on this matter are ambiguous. Sch. C (General Rule 1 (*a*)) only applies to "interest payable in the United Kingdom." It therefore does not apply to the interest on the Yugoslavian Loan which was payable in New York, nor does it apply to the substituted interest offered by the defaulting debtors. In its original form, as applied to loans by a foreign Government, Sch. C provided by the second set of rules as to interest for the normal case where interest is paid by a paying agent in this country. The paying agent is to pay the tax on behalf of the persons entitled to the interest. He is to make the necessary returns, and it is upon him alone that the assessment is to be made. He is to pay the tax "out of the moneys "in his hands" (r. 3) and is entitled to remuneration based upon "the amount of the dividends paid from which tax has been "deducted." But in cases where payment of interest by means of coupons could be obtained out of as well as within the United Kingdom this machinery was not adequate for its purpose. It was possible in such cases for the bond holder to obtain payment abroad through a bank or other agent who presented the coupons and collected the interest on his behalf; or he could, if he pleased, sell his coupon to a coupon dealer, who would then collect the interest on his own behalf. Accordingly, provision was made for these cases by s. 26 of the Customs and Inland Revenue Act, 1885, and is now embodied in r. 7 of the second set of rules as to interest under Sch. C. The relevant paragraph of that rule runs as follows:

"(7.) The following persons, that is to say:—. . . . (*d*) Any "dealer in coupons who purchases coupons for any dividends "(save such as are payable in the United Kingdom only) "otherwise than from a banker or person acting as a banker, "or another dealer in coupons, shall be included as being "persons intrusted with the payment of dividends within the "meaning of these rules." Now the only dividends (which expression, of course, includes interest) which Sch. C sets out to tax are dividends payable in the United Kingdom including dividends which are payable either in the United Kingdom or elsewhere. The words in brackets confine the dividends to which r. 7 (*d*) relates to the case of dividends payable in the United Kingdom or elsewhere for the obvious reason that where they were payable exclusively in the United Kingdom the original machinery was adequate.

Now the original interest in the case of the Yugoslavian loan and the substituted interest offered in the case of both loans were payable exclusively out of the United Kingdom, and, therefore, fall altogether outside the scope of Sch. C as defined in General Rule 1 (*a*). But it is said on behalf of the appellants that r. 7 has had the effect of bringing into charge under Sch. C any purchase-money received in the United Kingdom on the sale of a coupon to a coupon dealer notwithstanding the fact that the interest payable on the coupon is not payable in the United Kingdom; and that the effect of the rule is to treat the purchase-money received from the coupon dealer as though it were the interest itself, thus imposing on the coupon dealer an obligation to deduct income tax from the purchase-money. I am unable to accept the view that r. 7 (*d*) so extends the scope of the charge under Sch. C. The rules only purport to deal with the interest affected by the charging provisions of the Schedule. They are described in the heading as " Rules as to interest, etc." These words clearly refer to the words in r. 1 of Sch. C: "interest, public "annuities, dividends and shares of annuities payable in the "United Kingdom." It is no doubt true that, if the language used is sufficiently clear, a machinery provision may operate so as to enlarge the scope of a charge. But here there is no such language; on the contrary the language used appears to me quite clearly to confine r. 7 (*d*) to interest, etc., payable (whether exclusively or not) in the United Kingdom. In other words, the provisions of r. 7 are merely machinery for collecting the tax on the subject-matter charged—namely, interest payable in the United Kingdom. They do not, in the case of a coupon which is sold, substitute the proceeds of sale as the taxable subject-matter, which is what the appellants here say.

It follows from what I have said that the finding of the Commissioners as to "deduction" of income tax from the purchase price paid by the coupon dealers is incorrect in law if it is meant to imply that tax was deducted in accordance with Sch. C.

The appellants' main argument, therefore, fails. But they claimed in the alternative that the purchase price of the coupons was "income arising from securities out of the "United Kingdom" and was charged with income tax under Case IV. of Sch. D. There are two sub-divisions of this argument. The first is that the purchase price was taxable by deduction under Miscellaneous Rule 7, which applies to certain interest, etc., the rules of Sch. C already discussed. The second is that Miss Paget was directly assessable in respect of the purchase price. The latter of these two contentions can be disposed of quite shortly. The purchase price received by Miss Paget was not income arising from the bonds at all. It arose from contracts of sale and purchase whereby Miss Paget sold whatever right she had to receive such income in the future as well as her right to take what was offered by the defaulting debtors. It is, in my opinion, quite impossible to treat this as equivalent in any sense to "income arising from" the bonds. A further aspect of this argument can be more conveniently dealt with later. With regard to the former contention, it would be sufficient to say that, in my opinion, neither the Municipality of Budapest nor the Kingdom of Yugoslavia is a "Foreign company society adventure or "concern" within the meaning of Miscellaneous Rule 7. But even if they or either of them could be thought to fall within those words, r. 7 does not, in my opinion, produce the result claimed. By sub-r. 2 of that rule "All the provisions "of Schedule C relating to . . . . dividends payable out of any "public revenue other than that of the United Kingdom, and "intrusted to any person . . . . for payment to any persons in "the United Kingdom shall extend to the tax to be assessed and "charged under this rule." We are, therefore, thrown back to the rules under Sch. C, and the result is that a dealer in coupons who purchases coupons for interest payable in respect of the securities of a foreign or colonial company society adventure or concern is a person intrusted with the payment of that interest within the meaning of the rules. The consequences of this are left by the Legislature in great obscurity, although in the normal case where there is no default the machinery so far as income tax is concerned no doubt works in practice. The coupon dealer, being a "person intrusted with payment "of dividends" must under r. 3 "out of the moneys in his "hands pay the tax on the dividends on behalf of the persons "entitled thereto." Under r. 2 he and he alone is assessable to the tax. What, then, in the case of the coupon dealer are "the moneys in his hands"? They cannot be the interest ultimately received from the debtor, since r. 7 (*d*) excludes from the definition of "persons intrusted with payment" a coupon dealer who purchases from another coupon dealer. These moneys, therefore, can apparently only be the purchase-money which the first coupon dealer pays to the seller of the coupon. But in paying the tax out of the purchase-money the coupon dealer is not paying tax on the purchase-money, for this, as has already been pointed out, is not the subject-matter of the tax; he is paying the tax "on the dividends" and he is paying it "on behalf of the person entitled thereto," scilicet to the dividends. This introduces a further difficulty, since the person entitled to the dividends is not the seller but the buyer or (proleptically) the person who ultimately receives payment of the interest from the debtor. In the normal case where there is no default and the coupon is accordingly worth its face value the interest which is struck with tax is (apart from any question of discount) worth in the market its face value less tax. The first coupon dealer will accordingly pay for it only that sum less tax, for he is the person accountable to the Revenue for the tax on the interest. If he then sells the coupon to a person who is proposing to obtain payment of the interest from the foreign debtor, he will require to be paid the face value of the coupon, for that is the amount which the purchaser will obtain from the debtor and will be entitled to keep without any liability to tax since tax has already been paid. The effect, therefore, would be, in the case of a sale to a coupon dealer, to cast the burden of the tax on the original owner of the coupon who, on the sale of the coupon, would receive only its face value less tax payable on that face value. This is exactly what happens whenever taxable income is sold, since the price which a purchaser will give will be diminished by the amount of the tax which he will have to bear. But this does not mean that the purchase price is the taxable subject-matter. Nor does it mean that the interest, if and when received, is to be deemed to be the income of the original seller. These considerations become of importance when the question of sur-tax arises, for it then becomes necessary to ascertain whether the seller has received " income "arising from " his security under Case IV. (or, if the case is a Sch. C case, " profits arising from interest etc. payable in the "United Kingdom out of any public revenue."). I have already stated that, in my opinion, Miss Paget did not receive such income.

But it is said, on behalf of the appellants, that this view would lead to the result that in the case of a sale to a coupon dealer the interest would not as such be assessable to sur-tax since it would merely form one item in the aggregate receipts of his business. This argument does not impress me. It is not difficult to think of cases in which income which, if received by A., would attract sur-tax, escapes tax if transferred to B.—the sale by A., a sur-tax payer, of an annuity belonging to him to B., who is not a sur-tax payer, is an obvious example. A similar argument was advanced in support of the proposition already discussed, that quite apart from Miscellaneous Rule 7 the purchase price was income of Miss Paget taxable under Case IV. of Sch. D. It was said that this proposition must be correct since otherwise, if a coupon were sold to a person other than a coupon dealer and the interest were collected by him, that interest would escape income tax altogether. Even if this consequence were to follow on such a sale, I should not accept the conclusion based upon it. But, in my opinion, it would not follow, for I am unable to see how the purchaser of the coupon could successfully contend that the interest received upon it was not income in his hands. It was not seriously disputed by the Attorney-General that if a number of coupons were cut off and sold together to a purchaser the interest on each coupon as received would be income in the purchaser's hands. I am quite unable to see how the position can be different if one coupon only is sold and no satisfactory reason for the distinction was suggested.

In the result I am in agreement with the conclusions of the learned judge, and these appeals must be dismissed with costs.

LORD ROMER (read by MACKINNON L.J.). During the years of assessment ending April 5, 1933, and April 5, 1934, respectively, the respondent, Miss Paget, was the holder of certain bearer bonds issued by the City of Budapest with interest coupons falling due for payment on July 1 and January 1 in every year. By reason of a decree of the Hungarian Government the coupons for interest falling due after January 1, 1932, were payable in Hungary only and then only with the consent of the National Hungarian Bank. In these circumstances, Miss Paget, instead of cashing the four coupons falling due during the two years of assessment, caused them to be sold through agents or coupon dealers in London. The gross proceeds of sale (including the proceeds of the unpaid part of the coupon falling due January 1, 1932, also sold during the years of assessment) amounted to 1172*l.* 10*s.* in the year ending April 5, 1933, and 1554*l.* 7*s.* 8*d.* in the year ending April 5, 1934. In each case the agents or coupon dealers deducted income tax from the proceeds of sale on payment to Miss Paget.

During the year of assessment ending April 5, 1934, Miss Paget was also the holder of certain bearer bonds of the

Lord Romer.

Kingdom of Yugoslavia with interest coupons falling due for payment on May 1 and November 1 in every year. The coupons were normally payable in New York in American dollars. The Government of Yugoslavia, however, having expressed its inability to pay the interest on the bonds in full, offered the bondholders the option of having the coupons maturing between November 1, 1932, and May 1, 1935, met in one of two ways. The two alternative methods of meeting the coupons in question need not be particularized. It is sufficient to say that neither of them involved a payment in the United Kingdom. Miss Paget did not avail herself of the option thus offered to her but, in September, 1933, sold the coupons falling due for payment on November 1, 1932, and May 1, 1933, through agents or coupon dealers in London. The gross proceeds of this sale amounted to 760*l.* 1*s.* 3*d.*, but the coupon dealers deducted income tax and credited only the net sum to Miss Paget's banking account.

The question now to be determined is whether the gross sums received by Miss Paget during the year ending April 5, 1933, from the sale of coupons of the City of Budapest bonds, and the gross sums received by her during the year ending April 5, 1934, from the sale of coupons of those bonds and the sale of coupons of the bonds of Yugoslavia respectively, form part of her total income from all sources for those two years, so as to render her liable to be assessed for sur-tax in respect of them. The Special Commissioners decided this question in favour of the Crown in relation to the Budapest bonds and in favour of Miss Paget in relation to the Yugoslavia bonds. An appeal by the Crown and a cross-appeal by Miss Paget were taken to Finlay J., who decided both in favour of Miss Paget. From his decision an appeal to this Court has been brought by the Crown in both cases, and these appeals now fall to be determined.

It is plain that the Crown can only succeed if the gross proceeds of sale formed part of Miss Paget's income properly chargeable to income tax. The fact that tax was deducted from those proceeds by the coupon dealers to whom the coupons were sold is immaterial if such deduction was not

C. A.
1938

INLAND REVENUE COMMISSIONERS *v.* PAGET.

PAGET *v.* INLAND REVENUE COMMISSIONERS.

Lord Romer.

properly made, even if the dealers accounted to the Crown for the sums so deducted. Whether they did so account or not does not appear. It was contended before us on behalf of the Crown that the gross proceeds formed part of Miss Paget's income and were taxable either under Sch. C or under Case IV. of Sch. D to the Income Tax Act, 1918.

I will deal first with Sch. C. The Act provides as follows: "Tax under Schedule C shall be charged in respect of all "profits arising from interest . . . . payable out of any "public revenue." To what extent if at all the coupons of either of the bonds were payable out of public revenue within the meaning of the Schedule may be a doubtful question. But it seems unnecessary to consider that question further. For the first of the General Rules applicable to the Schedule provides by para. (*a*) that tax under the Schedule shall extend to all profits arising from interest, public annuities, dividends, and shares of annuities payable in the United Kingdom out of any public revenue in the United Kingdom or elsewhere. It follows from this that notwithstanding the generality of the words of the Schedule itself, interest that is not payable in the United Kingdom is not chargeable under the Schedule. Now none of the coupons with which we are concerned was at the material date payable in the United Kingdom, and but for the sale of the coupons Miss Paget would have been chargeable to tax in respect of the interest that they represented not under Sch. C, but under Case IV. of Sch. D, as being "Tax in respect of income arising from "securities out of the United Kingdom except such income "as is charged under Schedule C." Before passing, however, from Sch. C, it is desirable, for reasons that will appear later, to consider the provisions made by the rules to such Schedule for the collection of the tax with which it is concerned.

The first of the General Rules provides by para. (*c*) that tax under the Schedule shall be paid by the persons and bodies of persons respectively intrusted with payment on behalf of the persons entitled thereto. Following immediately after the General Rules are special rules as to interest, etc., payable out of public revenue to or through the Bank of

England or the Bank of Ireland or by the National Debt Commissioners, and following those rules are "Rules as to "interest, etc., with the payment of which persons other than "the Bank of England, the Bank of Ireland and the National "Debt Commissioners are intrusted." The words "interest, "etc.," mentioned in this title plainly refer to the "interest "public annuities dividends and shares of annuities payable "in the United Kingdom" that are mentioned in the first of the General Rules.

By r. 3 of the Special Rules last referred to, it is enacted, so far as material, as follows: "The person intrusted with "payment shall out of the moneys in his hands pay the "tax on the dividends on behalf of the persons entitled "thereto," and a further rule provides that the payment of the tax shall be made to the Commissioners of Inland Revenue and that in default of such payment it shall be recovered from the persons intrusted with payment in the same manner as other income tax assessed and charged upon him may be recovered. Dividends in the rule include, no doubt, interest.

Pausing there, it is to be observed that dividends payable in the United Kingdom and chargeable under the Schedule may not be payable in the United Kingdom only. The person entitled to be paid the dividends may have an option of having the coupons paid abroad. Should he exercise that option the persons abroad entrusted with the payment are not and cannot be affected by the Act, and on presentation of the coupons will pay the dividends without deduction of tax. In such a case Sch. C contains no provision for the collection of the tax at source, and there are no provisions for direct assessment on the person entitled to the dividends. They would therefore not be chargeable under that Schedule and would accordingly fall to be charged under Case IV. of Sch. D by direct assessment. But the owner of a coupon, instead of collecting the dividend abroad himself, may cause the coupon to be sold in this country, or may entrust the coupon to an agent for collection on his behalf. It is accordingly provided by r. 7 that the persons therein described under paras. (*a*) to (*d*) inclusive shall be included as persons

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
PAGET.
PAGET
v.
INLAND REVENUE COMMISSIONERS.

Lord Romer.

being entrusted with the payment of the dividends within the meaning of the rules. These persons so far as material for the present purpose are the following: (*b*) Any banker or person acting as a banker, who sells or otherwise realizes coupons for any dividends (save such as are payable in the United Kingdom only), and pays over the proceeds to any person or carries the same to his account; (*c*) Any person who by means of coupons received from any other person or otherwise on his behalf, obtains payment of any dividends elsewhere than in the United Kingdom; (*d*) Any dealer in coupons who purchases coupons for any dividends (save such as are payable in the United Kingdom only) otherwise than from a banker or person acting as a banker, or another dealer in coupons. Being persons entrusted with the payment of dividends within the meaning of the rules, the duty is imposed upon them by r. 3 of paying the tax on the dividends on behalf of the persons entitled thereto out of the moneys in their hands. Now in the case of the person mentioned in para. (*c*) the moneys in his hands available for payment of the tax will be dividends paid to him abroad. But in the case of the sale of coupons by a banker the dividends will not be received by him and the money in his hands out of which he is to pay the tax on behalf of the persons entitled to the dividends must be the proceeds of the sale. Now take the case of the person mentioned in para. (*d*). No dividend may ever reach his hands. For he may sell the coupons to another dealer, and the second dealer is not a person affected by the rule. What then in his case are the moneys out of which the tax is to be paid? The rule, it is to be noticed, does not say *any* moneys in his hands, but *the* moneys; and the only moneys in the hands of a dealer who has not himself received the dividend that have any reference to the transaction and can therefore alone be properly described as "the" moneys will be the purchase-money, and the vendor will only receive the net purchase-money after deduction therefrom of the tax. But this is merely a method of collecting the tax, and in no way leads to the conclusion that the purchase price in the cases (*b*) and (*d*) is the thing that is taxed, or that the purchase price is treated by the Legislature as being for taxation purposes the dividends themselves. For the tax, though paid out of the purchase-money, is according to the rule the tax on the dividends, and must be calculated by reference to the amount of the dividends and not of the purchase-money. Furthermore, the tax is to be paid on behalf of the persons entitled to the dividends, and those persons will be not the vendor but those who become the ultimate purchasers of the coupons. The tax will, no doubt, fall in fact upon the vendor, for he will receive less for his coupon by reason of the tax than he would have received had no tax been leviable. But this is what one would expect from the very nature of the business transaction. If a man sells his right to receive a dividend of 100*l.* from a British Government security, the purchaser (disregarding for simplicity all questions of discount) will only pay 75*l.* for it. The result will be the same when he sells to a coupon dealer, for encashment abroad, a coupon for 100*l.* of a foreign Government security that is also payable in the United Kingdom. The purchase price will be 100*l.*, for that is what the purchaser will get when he collects the dividend abroad. But, owing to r. 7, the vendor will only receive 75*l.* out of the purchase-money, the Commissioners of Inland Revenue receiving the remaining 25*l.* Nevertheless, it is the dividend in each case that is being taxed, and not the purchase-money.

Let me now turn to Case IV. of Sch. D, for, as I have already pointed out, it is under that Case that the interest on the bonds now in question falls to be taxed. The first of the rules applicable to that Case is, so far as material to the present purpose, in these words: "The tax in respect of "income arising from securities in any place out of the United "Kingdom shall be computed on the full amount thereof "arising in the year of assessment, whether the income has "been or will be received in the United Kingdom or not . . . . "and the provisions of this Act (including those relating to "the delivery of statements) shall apply accordingly."

If, therefore, Miss Paget had not sold her coupons, she could have been assessed in respect of the interest to which they refer. But in certain cases the tax on income from securities out of the United Kingdom is collected otherwise than by direct assessment. For it is provided by r. 7, sub-r. 1 (*a*), of the Miscellaneous Rules applicable to Sch. D as follows: "Where 1—(*a*) any interest, dividends, or other "annual payments payable out of or in respect of the stocks, "funds, shares, or securities of any foreign or colonial company, "society, adventure, or concern .... are intrusted to any person "in the United Kingdom for payment to any persons in the "United Kingdom, the same shall be assessed and charged "to tax under this Schedule by the special commissioners." Then comes para. (2.) of the same rule in these words: "All "the provisions of Schedule C relating to the tax to be assessed "and charged in respect of dividends payable out of any "public revenue other than that of the United Kingdom, and "intrusted to any person (other than the National Debt "Commissioners or the Bank of England or the Bank of "Ireland) for payment to any persons in the United Kingdom, "shall extend to the tax to be assessed and charged under "this Rule." But these provisions do not apply to the present case, for neither the Municipality of Budapest nor the Government of Yugoslavia can properly be described as a company, society, adventure or concern. The deduction of tax by the coupon dealers from Miss Paget's purchase-money was therefore an illegal deduction. But even if the Municipality and the Government had been within the rule so that the deduction was lawful, that fact alone could not enable the Crown to treat the purchase-money as income of Miss Paget brought into tax for the reasons that I have already given when dealing with the provisions of Sch. C. In other words, I am of opinion that unless the proceeds of the sale of Miss Paget's coupons could, apart from the provisions of r. 7, properly be described as income arising from the bonds in question, they would not have to be treated as being such income merely by reason of these provisions, assuming such provisions to be applicable.

In these circumstances, the only question to be decided is whether the proceeds of sale of a right to receive income in the future can be treated as income for the purpose of the Income Tax Acts. The question thus broadly stated plainly admits of but one answer; and that answer must be in the negative. The proceeds of the sale for a lump sum of an annuity, for instance, are capital in the hands of the vendor and not income. And this is true even when the subject of the sale is not the annuity for its whole duration but the right to be paid the annuity for a number of years or even for one year. Nor is it any the less true because the purchaser will pay less for an annuity that will be subject to a deduction of income tax in his hands than he would pay for a tax free annuity. Nor is it any the less true because in many cases the net income when paid to the purchaser is not income in his hands. In the case, for instance, of a man carrying on the business of dealing with coupons, the sum collected by him on cashing a coupon will be merely a trade receipt and not income. Tax may have been deducted on payment of the coupon, but for sur-tax purposes the interest represented by the coupon cannot be regarded as forming part of the total income of anybody. This is a position that frequently occurs. The net income received by a trustee under a trust for accumulation of income is a case in point. But it is easy to conceive cases which, while appearing at first sight to be sales for money or money's worth of a right to receive income in the future, are not in reality sales at all. If a man possessed of a coupon representing interest payable under deduction of tax hands it to his tailor as a convenient method of paying for a suit of clothes, the tailor when cashing the coupon may well be considered as doing so on behalf of his customer, and then paying himself out of the proceeds. The customer in such a case could not avoid returning the gross amount of the interest as part of his total income for sur-tax purposes. If, on the other hand, the tailor were to accept the coupon in full discharge of his account the interest that it represents would not, when paid, be income of the customer. Still less would the suit of clothes form part of his income. In the present case there is nothing to suggest that the transactions between Miss Paget and the coupon dealers merely constituted them her agents for collecting the interest on her bonds, even though, as was probably the case, they did in fact collect the interest or what represented the interest. The transactions appear to have been bona fide transactions of sale and purchase. The moneys received from them by Miss Paget were held by Finlay J. to be simply the purchase price of the coupons and in no sense income from foreign securities. In my judgment he was right in so holding, and the appeals should be dismissed with costs.

MacKinnon L.J. I agree that these appeals fail. The Case finds that, as to each set of coupons, Miss Paget sold them "through agents or coupon dealers in London." It is not clear whether this means "to" agents or coupon dealers. Probably all that is known is that she handed the coupons to such a dealer or dealers, and received payments in return.

The Case also finds that, as to each set of coupons, "the "agents or coupon dealers deducted income tax from the "proceeds of sale on payment to Miss Paget." This is an ambiguous statement. A coupon dealer may deduct tax as being the agent to collect the tax and pay it to the Inland Revenue authorities; in which event he will, pursuant to s. 26 of the Customs and Inland Revenue Act, 1885, or its present equivalent, be entitled to a poundage remuneration. Or he may deduct tax as being himself liable to have it deducted when he hands the coupon on to some one who is the agent to collect the tax and pay it to the Inland Revenue authorities. Or he may deduct tax, not because he, or some one to whom he hands the coupon, is, or can be, the agent to pay the tax, but because he will have to include the proceeds of the coupons, however he realizes them, in the income tax account of the profits of his business. Or, lastly, he may have had no other reason than a belief that, under the statutes, it was his duty as a coupon dealer to deduct income tax, and therefore quoted Miss Paget a price for her coupons from which he deducted tax at the standard rate. I do not see how, in this case, he could have been acting on either the first or the second of these alternatives, since it would be impossible to calculate the sum (i.e., the sterling equivalent of the amount to be ultimately realized on the coupons abroad) on which tax was payable. I suspect he must have acted on the fourth ground. In any case there was apparently no evidence offered to the Commissioners to show that the coupon dealers, or any other agents, had collected any dividends and paid income tax thereon to the Inland Revenue.

The claim to assess Miss Paget for sur-tax upon the amounts she received from the coupon dealers (plus the amounts they deducted) was first said to arise under Sch. C. I think the short but conclusive answer to that claim is that neither the bearer bonds of the City of Budapest nor those of Yugoslavia come within the primary rule of Sch. C as being "interest, etc., "payable in the United Kingdom." It was argued that they did so become payable by virtue of r. 7 (*d*) of the second set of Special Rules as to Sch. C. But the coupon dealer under that rule is to be included as being a person "intrusted with "the payment of dividends within the meaning of these "rules." That is, he is to be included in a class of persons which has already been defined in the rules. That class is defined in r. 1 and r. 3 of the same fasciculus, i.e., "Every "person . . . . who is intrusted with the payment of any "dividends which are payable to any persons in the United "Kingdom out of any public revenue other than that of the "United Kingdom." Rule 7 is clearly only an enlargement of the machinery for collection of the tax payable under Sch. C. But it cannot enlarge the ambit of Sch. C so as to make it include profits or income other than those which are "payable "in the United Kingdom."

As I think that, for these reasons, neither of these claims can be supported under Sch. C, it is unnecessary to consider the subsidiary point as to the Budapest loan—namely, whether it can properly be said that the interest or dividends from it were "payable out of any public revenue."

The alternative claim was put forward under Case IV. of Sch. D as being "Tax in respect of income arising from "securities out of the United Kingdom, except such income

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
PAGET.
PAGET
v.
INLAND REVENUE COMMISSIONERS.

MacKinnon L.J.

"as is charged under Schedule C"; And, with reference to the intervention of the coupon dealers in this case, reliance is put upon r. 7 of the Miscellaneous Rules applicable to Sch. D, by which the rules under Sch. C are made to apply. So that a coupon dealer is "to be deemed to be a person intrusted with "the payment of such dividends." But as "such dividends" are those "payable out of . . . . securities of any foreign ". . . . company, society, adventure, or concern," it might be a question whether either the bonds of the City of Budapest, or the bonds of the State of Yugoslavia, came within that description.

I do not think it is necessary to discuss that question. For in my view the claim to charge Miss Paget under Case IV. of Sch. D in respect of the moneys she received from the coupon dealers must fail upon broader grounds.

Tax under Case IV. is to be charged "in respect of income "arising from securities in any place out of the United "Kingdom." And that phrase is repeated in r. 1 of the Rules applicable to Case IV. In both these cases the foreign debtors had defaulted, and refused to pay the interest promised by their bonds. Budapest offered to pay instead a certain amount of pengos which could only be enjoyed as currency within the limits of Hungary. Yugoslavia offered instead to pay in dinars, or partly in dinars and partly in funding bonds. What Miss Paget sold was the possibility of making some money abroad upon the acceptance of these offers. The money she so received is said to be "income from securities." If Budapest had offered, in lieu of paying the interest due on the bonds, to hand over so many quarters of wheat for each coupon, Miss Paget might have realized some money by selling her coupons to a corn dealer with foreign trade connections. The Attorney-General did not shrink from the proposition that the money she received from the corn dealer would be "income from a security outside the United Kingdom." This was logical, but, in my opinion, irrational.

The fundamental fact is that no interest or dividends have been paid on these securities out of the United Kingdom. The debtors have defaulted. But the essential requirement of the charging Schedule is that tax shall be payable on the dividends or interest that are paid. The rules as to Sch. C, incorporated as to Case IV. of Sch. D, including the rule about the coupon dealer being included as a person intrusted with the payment of dividends, all deal with the payment of "dividends," and the deduction of tax from those "dividends" when they are paid, or deemed to be paid. And, if they are acting under the rules, the coupon dealers would deduct the tax at the standard rate upon the amount of those "dividends." Though they are said to have deducted tax, they cannot have done so upon the amount of the dividends, since none were payable. Presumably, as I said before, they quoted her a price for the coupons, i.e., for the expectation of realizing something out of them abroad, and deducted tax from that quoted price. But if they had agreed to pay her a net price, saying nothing about income tax, I cannot see how they could be charged with an infraction of rr. 3 and 4 of the rules under Sch. C. Rule 7 makes a coupon dealer "a person intrusted with the payment of dividends." Rule 3 says that such a person "shall pay the tax on the dividends "on behalf of the person entitled thereto." And r. 4 says that such person shall pay the tax to the account of the Commissioners of Inland Revenue at the Bank of England. If the dividends are not paid, none of this machinery applies. And the coupon dealers here, who are ambiguously said to have deducted tax from the sum they paid Miss Paget, cannot have deducted it under r. 3, and cannot have paid it under r. 4.

And that consideration imports another. Miss Paget can only be liable for sur-tax on income liable to assessment to income tax, or income that has paid income tax by suffering deduction. Here she has received a smaller price for what she sold, and that is said to have been by virtue of deduction of tax. But there was no evidence on which the Commissioners could or did find that the income had suffered deduction of tax in the true sense—namely, that any agent to pay dividends to her, or any one by the Acts deemed to be such an agent, had paid tax on her behalf to the Inland Revenue Commissioners.

BIBL. LONDIN

C. A.
1938

INLAND REVENUE COMMISSIONERS v. PAGET.
PAGET v. INLAND REVENUE COMMISSIONERS.

The fact remains that Miss Paget, as a result of her ownership of these coupons, has received certain sums of money. Whether she could be called upon to include those sums in her return of total income for the purposes of sur-tax by virtue of some other part of the legislation is not for me to speculate. But I am satisfied that the contention that she must do so under Sch. C, or under Case IV. of Sch. D, is, for the reasons I have given, unfounded, and, therefore, both these appeals must be dismissed.

Appeals dismissed.
Leave to appeal to House of Lords granted.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for Miss Paget: *Allen & Overy.*

W. I. C.

PRATT *v.* COOK, SON AND COMPANY (ST. PAUL'S), LIMITED.

1938
Feb. 3, 4, 7, 11.

[1936. P. No. 826.]

Master and servant—Packer employed by wholesale drapers—Manual labour—Deductions from wages for food—Part of wages paid otherwise than in current coin of the realm—Illegality—Claim for recovery of amounts deducted—Limitation of time—Debt on a specialty—Claim under statute—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 23—*Truck Amendment Act*, 1887 (50 & 51 *Vict. c.* 46), *s.* 2—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

The plaintiff had been employed for many years as a packer with a firm of wholesale drapers. The nature of his work was to assemble crates, which, when not in use, were kept in bundles, to line them with packing material, to cord them together, to nail on the top, and then either to stencil or to attach the label showing the destination. He also packed cases, which he would have to label after cording them, and cartons. Some of the packing consisted of stitching canvas covers round rolls of material. In March, 1920, the defendant company was formed to take over the business of the firm and they continued to employ the plaintiff as a packer. From March, 1920, to December, 1925, the defendant company paid the plaintiff a weekly sum in cash, and they also supplied him with dinner and tea on the premises. The agreed value of the meals so supplied by the defendant company was 10*s*. per week :—

Held, (1.) that the plaintiff was a manual worker who had entered into, or had worked under, a contract with the defendants, and was, therefore, within the protection of the Truck Acts ;

(2.) that the defendants had contravened s. 3 of the Truck Act, 1831, by supplying the plaintiff with meals as part of the remuneration for his labour. The defendants were not protected by s. 23, as there was no agreement or contract in writing and signed by the plaintiff authorizing any stoppage or deduction from wages for meals, as required by the proviso. The whole scope of the Truck Acts contemplated that deductions should not be made from a man's pay except by his consent, given personally, in circumstances of some formality ;

(3.) that the plaintiff was entitled to recover from the defendants, under s. 4, the agreed value of the meals so supplied, as being so much of the plaintiff's wages as had not been actually paid to him by the defendants in the current coin of the realm ;

(4.) that the plaintiff's action was for debt on a specialty for work done, and the period of limitation applicable under s. 3 of the Civil Procedure Act, 1833, was twenty years after the cause of action ; the plaintiff was therefore entitled to recover the full amount claimed.

1938

PRATT
v.
COOK, SON
& CO.
(ST. PAUL'S),
LD.

ACTION tried without a jury.

The plaintiff, who had been for many years employed by Cook, Son & Co., wholesale drapers, of St. Paul's Churchyard, joined the Army at some time in 1915, and on his return in 1919 was re-engaged by that firm. The terms of his employment were that he should be paid 53*s.* weekly, plus dinner and tea. In the course of negotiating what his wages should be, he asked for and saw Mr. Pragnell, the general manager. At the interview Mr. Pragnell said to him: " We "are giving you 53*s.* a week, and you will agree your dinner "and tea are worth an additional 10*s.*" To this the plaintiff assented and worked on those terms for that firm until March 8, 1920, when the defendant company came into existence and took over the business of the firm. The plaintiff continued in the employment of the company as a packer, receiving always the wage which complied with the minimum rate of wages paid to packers in the employment of the company, less 10*s.*, and received also his dinner and tea. For a short period before April, 1920, the wages he was paid, together with dinner and tea valued at 10*s.*, amounted to 3*s.* over the minimum rate of wage applied to packers employed by the firm.

On December 1, 1935, as a result of an agitation for which the plaintiff himself was partly responsible, a ballot was taken of those of the employees who were receiving dinner and tea, and the majority, having decided against the provision of dinner and tea, the defendants handed over part of their premises to the men concerned rent free to enable them to set up their own canteen, and from that date until March, 1936, when the plaintiff left the defendants' employment, he received, by way of wages, an additional 10*s.* in cash weekly. No suggestion was made at any time that the food supplied to the plaintiff was not well worth the 10*s.* From time to time the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, of which the plaintiff was a member, fixed by agreement with the Wholesale Textile Association, representing the masters, the scales of pay applicable to various grades of employees, and agreed on the conditions of employment. The plaintiff was one of the persons who assisted in bringing these terms into existence, his interest being, as he said, that these terms should be applied to the workers employed by the defendants, and, generally speaking, he approved of the terms so agreed between the union and the association, and in particular he stated in evidence that he had approved the condition which was entitled "Living in." The terms of that condition, which remained in all the various agreed scales and conditions, were as follows: "4. Living in "—allowance for board, 10*s.*; board and lodging, 20*s.*; 12*s.* 6*d.* "for board and lodging when on holidays, statutory holidays "not included. Those living in to live out if they so desire "by giving one week's notice and employers to give the same "notice if they desire employees to live out." This condition was in force from July 27, 1921, until some date in 1929, when the union gave notice to determine the arrangements. Throughout the period covered by the claim the conditions and scales of pay agreed on between the plaintiff's union and the association of masters were applied by the defendants, and the plaintiff regarded himself as being employed on the terms of those agreements.

The plaintiff was employed as a packer, and the nature of his work was to assemble crates which, when not in use, were kept in bundles, to line them with packing material, to cord them together, to nail on the top, and then either to stencil or to attach the label showing the destination. He also packed cases which he would have to label after cording them, and cartons. For eight months in the year he packed all manner of straw hats, particularly ladies' hats. For the other four months he was packing heavier materials, such as draperies, carpets, calicoes, children's underclothing and linoleum. Some of the packing would consist of stitching canvas covers round rolls of material. After the packing was completed the packages were taken away by porters.

On these facts the plaintiff claimed that he was a manual worker employed by the defendants, and that he was, from March 8, 1920, to December 1, 1935, remunerated for his services partly in current coin of the realm, and partly not

1938

PRATT *v.* COOK, SON & CO. (ST. PAUL'S), LD.

in current coin, and that to the extent of 10*s.* weekly he was throughout the period paid by the provision of meals. He claimed, therefore, that the payment in meals was illegal, null and void under s. 3 of the Truck Act, 1831 (1), and that he was entitled to recover from the defendants (under s. 4 of the Act) (2) so much of the wages which he earned as was not paid to him in current coin of the realm, namely, 10*s.* weekly, amounting to 397*l.* 10*s.* The defendants said that the plaintiff was not a manual worker and so was not entitled to the protection of the Truck Acts (3). Further, the defendants said that the plaintiff was not remunerated partly by current coin and partly by meals, but that the plaintiff was paid the amount of money which in fact he received, and that the provision of meals was a thing which the firm chose to do voluntarily, and that, they said, was permissible under the Truck Acts, and they relied on s. 23

---

(1) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 2: "If in any contract "hereafter to be made between "any artificer in any of the trades "hereinafter enumerated, and his "employer, any provision shall be "made directly or indirectly "respecting the place where, or "the manner in which, or the "person or persons with whom, "the whole or any part of the "wages due or to become due to "any such artificer shall be laid "out or expended, such contract "shall be and is hereby declared "illegal, null, and void."

Sect. 3: "The entire amount "of the wages earned by or "payable to any artificer in "any of the trades hereinafter "enumerated, in respect of any "labour by him done in any such "trade, shall be actually paid to "such artificer in the current coin "of this realm, and not otherwise; "and every payment made to any "such artificer by his employer, "of or in respect of any such "wages, by the delivering to him "of goods, or otherwise than in "the current coin aforesaid, except "as hereinafter mentioned, shall "be and is hereby declared illegal, "null, and void."

(2) Sect. 4: "Every artificer ". . . . shall be entitled to recover "from his employer . . . . in the "manner by law provided for the "recovery of servants wages, or "by any other lawful ways and "means, the whole or so much of "the wages earned by such artificer . . . . as shall not have "been actually paid to him by "such his employer in the current "coin of this realm."

(3) By s. 2 of the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), the application of the Act of 1831 was extended to cover any workman as defined by s. 10 of the Employers and Workmen Act, 1875, which definition included "any person who, being a labourer, "servant in husbandry, journeyman, artificer, handicraftsman, "miner, or otherwise engaged in "manual labour . . . . has "entered into or works under a "contract with an employer."

of the Truck Act, 1831 (1), as making it lawful to supply their employees with victuals, dressed or prepared, under the employers' roof. In addition they said that the terms agreed with the union, of which the plaintiff was a member, formed, if it be needed, an agreement in writing, which would make the deductions lawful. Further, the defendants relied on the statutes of limitation—the Act of 1623 (21 Jac. 1, c. 16) and the Civil Procedure Act, 1883—and said that if the plaintiff's claim was well founded at all, the plaintiff was only entitled to recover in respect of wages not paid in current coin of the realm over a period of two years before the issue of the writ, or at most over a period of six years. In answer to the defendants' contention that they were entitled to supply their employees with victuals under s. 23 of the Truck Act, 1831 (1), the plaintiff said that what in effect was done was to stop his wages to the extent of 10s. weekly in respect of the victuals with which he was supplied, and that the employer could only do this if he had first obtained an agreement or contract in writing signed by the plaintiff himself. Finally, as regards the period of limitation governing the claim, the plaintiff said that that period was twenty years, because his claim was for a debt on a specialty, namely, an Act of Parliament, the Truck Act, 1831.

Sir Stafford Cripps K.C. and *Melford Stevenson* for the

(1) Truck Act, 1831, s. 23: "Nothing herein contained shall "extend or be construed to extend "to prevent any employer of any "artificer, or agent of any such "employer, from supplying or contracting to supply to any such "artificer, any medicine or medical "attendance, or any fuel, ... "nor from supplying or contracting to supply to any such artificer "any victuals dressed or prepared "under the roof of any such employer, and there consumed by "such artificer; nor from making "or contracting to make any "stoppage or deduction from the "wages of any such artificer ". . . . for or in respect of any "such medicine or medical attendance . . . . fuel . . . . or of "any such victuals, dressed and "prepared under the roof of any "such employer . . . . Provided "always, that such stoppage or "deduction . . . . shall not be "in any case made from the wages "of such artificer, unless the "agreement or contract for such "stoppage or deduction shall be "in writing, and signed by such "artificer."

plaintiff. The plaintiff's claim is based on the Truck Act, 1831, s. 3 of which provides that every payment made to an artificer by his employer, of or in respect of any wages, otherwise than in the current coin of the realm is declared illegal, null, and void. The plaintiff entered into a contract of service with the defendants' predecessors in 1900 and was to be paid 18*l.* plus board and lodging. At first he was a porter, but later became a packer. In March, 1920, the defendants were incorporated and they continued to employ him as a packer until he left their employment in 1936. The claim is in respect of the period from March, 1920, until December, 1935. During that period he was paid a weekly sum in cash and the defendants gave him dinner and tea on the premises. The agreed value of these meals was 10*s.* per week.

The first point to be decided is whether the plaintiff comes within the protection of the Truck Acts. Sect. 19 of the Truck Act, 1831, limited the application of that Act to artificers, workmen or labourers employed in manufactures and in mines and quarries, but by s. 2 of the Truck Amendment Act, 1887, the application of the Act of 1831 was extended to cover any workman as defined in s. 10 of the Employers and Workmen Act, 1875. The definition in the Act of 1875 includes any person who, being a labourer, or a person otherwise engaged in manual labour, has entered into or works under a contract with an employer. The test of whether an employee is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment: *Bound* v. *Lawrence.* (1) The plaintiff was employed as a packer in a wholesale drapers' warehouse, and, applying the test laid down in *Bound* v. *Lawrence* (1) to his work, he was engaged in manual labour. The point was discussed by Palles C.B. in *Reg.* (*Holywood*) v. *Justices of County Louth* (2), where some of the earlier cases were examined. The plaintiff is, therefore, entitled to the protection of the

(1) [1892] 1 Q. B. 226.

(2) [1900] 2 I. R. 714.

Truck Acts. Under s. 3 of the Truck Act 1831, every payment made to him by his employer, of or in respect to his wages, or any part of his wages, otherwise than in the current coin of the realm is illegal, null and void. The defendants have contravened s. 3 of the Truck Act, 1831, and the plaintiff is entitled to recover against them under s. 4 "so "much of the wages earned by him as had not been actually "paid to him by the defendants in the current coin of the "realm." See *Penman* v. *Fife Coal Co., Ld.* (1), where *Hewlett* v. *Allen & Sons* (2) was distinguished. The employers cannot plead, in answer to a claim for wages, that the workman has had the value of the wages claimed in goods. In any action for wages brought by an employee against his employer no set off shall be allowed for goods supplied: see s. 5 of the Truck Act, 1831. By s. 6 of the Act of 1831, an employer cannot maintain an action or counterclaim against an employee for goods supplied to such employee on account of wages. A contract of employment which violates the Truck Act, 1831, is completely set aside by s. 1 of that Act, and a statutory right to recover so much of his wages as has been actually paid not in current coin is given to the employee by s. 4 of the Act: see *Kenyon* v. *Darwen Cotton Manufacturing Co., Ld.* (3)

The Civil Procedure Act, 1833, by s. 3 deals with the limitation of action of debt. The period of limitation applicable to the plaintiff's claim is twenty years, or, alternatively, six years. The two years' limitation only applies to actions for penalties, or damages, or sums of money in the nature of penalties: see *Thomson* v. *Lord Clanmorris*, per Lindley M.R. (4) This is a claim to recover a sum of money under s. 4 of the Truck Act, 1831, and it is submitted that it cannot be within the interpretation in that case. It is not an action for a penalty. In *Gutsell* v. *Reeve* (5) a question arose, under s. 7 of the Agricultural Wages (Regulation) Act, 1924, whether an agricultural labourer, claiming from his employer the difference between the amount of wages actually received by him from his employer under the contract of employment and the amount of the minimum wages fixed by the Act of 1924, was entitled to claim back wages for twenty years or only for six years. It was held that the action was not on a specialty, but for a simple contract debt, and that the period of limitation applicable in that case was six years, and not twenty years as provided by s. 3 of the Civil Procedure Act, 1833. Sect. 7 of the Agricultural Wages (Regulation) Act, 1924, preserves to the worker a right to sue his employer, but s. 1 of the Truck Act, 1831, where it operates, abolishes the whole contract of employment and s. 4 of the Act gives the worker a new right of action against his employer.

---

(1) [1936] A. C. 45.

(2) [1894] A. C. 383.

(3) [1936] 2 K. B. 193.

(4) [1900] 1 Ch. 718, 725.

(5) [1936] 1 K. B. 272.

[*Cork and Bandon Ry. Co.* v. *Goode* (1), was referred to.]

F. P. M. Schiller K.C., *G. O. Slade*, and *C. M. Cahn* for the defendants. This case is far removed from the spirit of the Truck Acts. Until 1887, it could not be pretended that the Truck Act, 1831, applied to such a case as this at all. It is only by virtue of s. 2 of the Truck Amendment Act, 1887, that it has become possible to bring this action. Sect. 19 of the Truck Act, 1831, specified the trades to which that Act was to apply. Sect. 2 of the Act of 1887 extended the application of the Act of 1831 to any " workman " as defined by s. 10 of the Employers and Workmen Act, 1875.

The action turns on the construction of a highly penal statute. Therefore, it is submitted that the provisions of the relevant sections should be interpreted strictly. An employer is entitled to say to a workman : " I will employ " you at a wage of so much and I will give you your board " and lodging as well." There is nothing in the Truck Act to prevent that.

Sect. 23 of the Truck Act, 1831, provides, in effect, that nothing in the Act shall extend, or be construed to extend, to prevent an employer from supplying or contracting to supply certain things there specified, which include medicine or medical attendance, fuel, or victuals dressed or prepared

(1) (1853) 13 C. B. 826.

under the roof of the employer, nor (subject to the proviso) from making or contracting to make any stoppage or deduction for or in respect of any such things. By the proviso no such stoppage or deduction shall be made in any case unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by the workman. No contract is necessary for the supply of food and drink.

In *Chawner* v. *Cummings* (1) the Court had to consider the legality of deductions in the case of knitted gloves. Deductions were made for frame rent, a standing room charge, wear and tear of machinery and other matters. The Court held that a contract to pay the knitter's wages subject to those deductions was not a contract to pay part of the knitter's wages otherwise than in the current coin of the realm, but that the so-called deductions were nothing more than a mode of regulating the amount of the wages. That decision was considered in *Archer* v. *James* (2), which raised a similar point. The Court of Exchequer Chamber was equally divided in opinion on the question whether or not that case was within the Truck Act, 1831. In this case there is no question of any deduction. What the employers have done in this case comes within the permissive provisions of s. 23 of the Act of 1831. The section deals with two sets of circumstances, (1.) supplying or contracting to supply; and (2.) stoppage or deduction from wages. In this case there was no stoppage or deduction. The proviso to s. 23 does not apply. The plaintiff was supplied with food, which was admittedly worth 10*s*. per week, in addition to his wages. There was nothing illegal in that. Sect. 23 cuts down the general effect of the Act of 1831 in respect of particular matters.

[WROTTESLEY J. There is here a clear breach of s. 3 of the Truck Act, 1831, and to excuse that breach, the defendants must bring themselves within s. 23.]

If the defendants can bring themselves within s. 23 the action fails.

The plaintiff is not a manual worker and, therefore, is not within the Truck Act, 1831. In *Morgan* v. *London General Omnibus Co.* (1) the Court had to consider the status of an omnibus conductor, and it was held that he was not engaged in manual labour and, therefore, was not a workman to whom the Employers and Workmen Act, 1875, applied. In *Yarmouth* v. *France* (2) Lord Esher M.R., dealing with the case of a driver employed by a wharfinger, said that his real labour, "that which tests his muscles and his sinews," was the loading and unloading of the trolley or the lighter. It was held that he was a workman within the Act of 1875.

---

(1) (1846) 8 Q. B. 311.
(2) (1859) 2 B. & S. 61; (1862) 2 B. & S. 67.

The test to be applied is to look at the man's main and substantial work, to see whether it involves the exercise of his muscles and sinews. If it does not, and if his manual labour is only incidental to his main employment, he cannot be brought within the Truck Acts. The decisions are not quite uniform, but, applying the principles stated in the judgments to the facts of this case, the plaintiff's main employment involved the use of varying degrees of skill. It did not involve the exercise of his muscles and sinews within the test laid down by Lord Esher M.R. in *Yarmouth* v. *France.* (2) In *Smith* v. *Associated Omnibus Co.* (3) it was held that the driver of a motor omnibus who, when out with the omnibus, had to do such necessary repairs as he was able to do was "otherwise engaged in manual labour" within s. 10 of the Employers and Workmen Act, 1875. *Cook* v. *North Metropolitan Tramways Co.* (4) was distinguished. See also *Maynard* v. *Peter Robinson, Ld.* (5)

With regard to the proviso to s. 23 of the Act of 1831, there were agreements between the plaintiff's union and the employers' association, regulating the terms of the men's employment. What is there to prevent the artificer from signing by his duly authorized agent, such as an official of his union? There is nothing in the Act to say that it shall only be the artificer who is to sign. The defendants had recognized the agreements between the plaintiff's union and the employers' association as part of the terms of the employment. On the question of the Statutes of Limitation, this is in effect an action for work and labour done—an indebitatus count. There is a distinction between an action for money due under a statute and an action which is permitted to be brought by a statute. It is submitted that the two years' period of limitation applies to the plaintiff's claim. Alternatively, if that is wrong, then it is a simple contract debt and the limitation period of six years applies and not twenty years.

---

(1) (1884) 13 Q. B. D. 832.
(2) (1887) 19 Q. B. D. 647, 651.
(3) [1907] 1 K. B. 916.
(4) (1887) 18 Q. B. D. 683.
(5) (1903) 89 L. T. 136.

Sir Stafford Cripps K.C. in reply. *Chawner* v. *Cummings* (1) has never been approved, but it has been dissented from—not eo nomine. The proviso to s. 23 of the Act expressly prohibits stoppages or deductions from wages unless there is an agreement or contract in writing for such stoppages or deductions signed by the artificer. The Courts have decided that a written agreement so signed was essential to the validity of deductions in respect of medicine and medical attention and rest: see *Pillar* v. *Llynvi Coal & Iron Co., Ld.* (2) and *Cutts* v. *Ward.* (3) There must be an agreement in writing signed by the employee to validate the deductions under s. 23.

The test of manual labour is whether the man works with his head or with his hands. The plaintiff's work is done with his hands. Skill is not the test. All manual work requires some skill; some of it, e.g., the work of an agricultural labourer, requires a very high degree of skill: see *Jaques* v. *Steam Tug Alexandra (Owners).* (4) The action is brought under the Truck Act, 1831, for a specialty debt and the twenty years' period of limitation applies.

Cur. adv. vult.

1938. Feb. 11. WROTTESLEY J. read a judgment in which, having stated the facts, he said: The first matter to be decided is whether the plaintiff is within the protection of the Truck Acts. When the Truck Act, 1831, was passed it was limited in its application to persons employed in

---

(1) 8 Q. B. 311.
(2) (1869) L. R. 4 C. P. 752.
(3) (1867) L. R. 2 Q. B. 357.
(4) [1921] 2 A. C. 339.

1938

PRATT v. COOK, SON & CO. (ST. PAUL'S), LD.

Wrottesley J.

manufacture and persons employed in mines and quarries: see s. 19. But by the Truck Act, 1887, s. 2, the application of the Act of 1831 was extended to cover any workman as defined in the Employers and Workmen Act, 1875, s. 10, and that definition is as follows: "The expression 'workman' "does not include a domestic or menial servant, but save as "aforesaid, means any person who, being a labourer, servant "in husbandry, journeyman, artificer, handicraftsman, miner, "or otherwise engaged in manual labour, whether under the "age of twenty-one years or above that age, has entered "into or works under a contract with an employer." The question, therefore, depends for its answer upon whether the plaintiff is a labourer or is engaged in manual labour. The test to be applied is, firstly, whether manual labour is his real and substantial employment: see *Bound* v. *Lawrence*. (1) Further, it has been held by the House of Lords in *Jaques* v. *Owners of Steam Tug Alexandra* (2), where the phrase "manual labour" fell to be interpreted by Lord Sumner (3), that the test of what is not manual labour is that which principally involves the exercise of mental qualities. It has been said by Sir William Brett M.R. in *Morgan* v. *London General Omnibus Co.* (4), in considering the status of an omnibus conductor for the purposes of the definition which I have to construe, that the judges must use their own knowledge of the various employments existing throughout the realm.

After listening closely to the nature of the work done by the plaintiff as he described it and to the answers he gave in cross-examination, I have come to the conclusion that he was engaged in manual labour. It is perfectly true that much skill is required of a packer, at any rate of some of the goods which had to be packed in this business. But the phrase "manual labour" certainly does not exclude the exercise of skill. The plaintiff's real job was to work with his hands, and the nature of his work, is, I think, properly described as manual labour. A number of cases were cited to me, including all those referred to by Palles C.B. in *Reg.* (*Holywood*) v. *Justices of County Louth* (1), which are only really the application of these principles to particular forms of employment. The plaintiff being, therefore, a person who is entitled to the benefit and protection of the Truck Acts, the next question is whether on the facts set out above he received a part of his wages not in current coin of the realm. If he did, such payment was made illegal, null and void by s. 3 of the Truck Act, 1831, and he is entitled under s. 4 to recover from the defendants, in the manner by law provided for the recovery of servants' wages or by any other lawful ways and means, so much of the wages earned by him as were not actually paid to him in coin. It is important at this stage to bear in mind the definitions of "wages" and "contract," which are to be found in s. 25 of the Act. They are as follows: "within "the meaning and for the purposes of this Act any money "or other thing had or contracted to be paid, delivered, or "given as a recompense, reward, or remuneration for any "labour done or to be done, whether within a certain time or "to a certain amount, or for a time or an amount uncertain, "shall be deemed and taken to be the 'wages' of such labour; "and within the meaning and for the purposes aforesaid "any agreement, understanding, device, contrivance, collusion, "or arrangement whatsoever on the subject of wages, whether "written or oral, whether direct or indirect, to which the "employer and artificer are parties or are assenting, or by "which they are mutually bound to each other, or whereby "either of them shall have endeavoured to impose an obligation "on the other of them, shall be and be deemed a 'contract.'"

---

(1) [1892] 1 Q. B. 226.

(2) [1921] 2 A. C. 339.

(3) [1921] 2 A. C. 339, 345.

(4) (1884) 13 Q. B. D. 832.

On the evidence I have no doubt that in fact ever since 1920, indeed ever since 1919, the plaintiff was remunerated for his labour partly and to the extent of 10*s.* weekly by the provision of dinner and tea which he had under his employers' roof. It is true that the plaintiff never asked whether he could receive instead of meals their value or 10*s.* weekly. Indeed, the plaintiff knew and admitted that he was being dealt with on the terms which his own union had agreed with the association of masters, and it will be remembered that one of those terms was "allowance for board 10s." Moreover, when the plaintiff was on holiday, he always got the 10s. in cash extra to make up for the food which he did not consume. The plaintiff said that had he demanded 10s. instead of food, it would have meant his dismissal. No evidence was called to deny this. Indeed, in 1933 Mr. Hann, an official of the plaintiff's union, having written to the defendants' manager suggesting that the men should receive money instead of meals, the latter replied that the firm did not see their way to make any alteration in the arrangements for meals, which they considered to be most satisfactory, both from the men's point of view, in that they were sure of a solid meal, and from the firm's point of view, because they knew their employees were well nourished. The view expressed by the defendants is both humane and reasonable, but I find it difficult to reconcile that point of view with the suggestion that the meals so provided were not given as part of the remuneration for the labour done by the plaintiff. I am satisfied, therefore, that throughout the period covered by the claim, the defendants paid the plaintiff partly by the money that they paid him weekly, and to the extent of 10s. by the meals which they provided.

---

(1) [1900] 2 I. R. 714.

But, say the defendants, the provision of meals is permissible under the Truck Acts. Now s. 3 of the Truck Act is as follows: "All wages shall be paid to the artificer in coin. "Payment in goods declared illegal. The entire amount of "the wages earned by or payable to any artificer . . . . in "respect of any labour by him done . . . . shall be actually "paid to such artificer in the current coin of this realm, and "not otherwise; and every payment made to any such "artificer by his employer, of or in respect of any such wages, "by the delivering to him of goods, or otherwise than in the "current coin aforesaid, except as hereinafter mentioned, "shall be and is hereby declared illegal, null, and void." The words "except as hereinafter mentioned" refer, firstly, to s. 8 of the Act, which permitted payment by Bank of England notes, and in certain circumstances by cheque, and,

1938

PRATT
v.
COOK, SON
& CO.
(ST. PAUL'S),
LD.

Wrottesley J.

secondly, they refer to s. 23 of the Act, which is as follows: "Particular exceptions to the generality of the law. Nothing "herein contained shall extend or be construed to extend to "prevent any employer of any artificer, or agent of any such "employer, from supplying or contracting to supply to any "such artificer any medicine or medical attendance, or any "fuel, or any materials, tools or implements to be by such "artificer employed in his trade or occupation, if such artificers "be employed in mining, or any hay, corn, or other provender "to be consumed by any horse or other beast of burden "employed by any such artificer in his trade and occupation; "nor from demising to any artificer . . . . the whole or any "part of any tenement at any rent to be thereon reserved; "nor from supplying or contracting to supply to any such "artificer any victuals dressed or prepared under the roof of "any such employer, and there consumed by such artificer; "nor from making or contracting to make any stoppage or "deduction from the wages of any such artificer for or in "respect of any such rent, or for or in respect of any such "medicine or medical attendance, or for or in respect of such "fuel, materials, tools, implements, hay, corn, or provender, "or of any such victuals dressed and prepared under the roof "of any such employer, or for or in respect of any money "advanced to such artificer for any such purpose as aforesaid: "Provided always, that such stoppage or deduction shall not "exceed the real and true value of such fuel, materials, tools, "implements, hay, corn, and provender, and shall not be in any "case made from the wages of such artificer, unless the "agreement or contract for such stoppage or deduction shall "be in writing, and signed by such artificer."

This section can be divided into three parts. The first part permits the employer to supply or to contract to supply such things as medicine, medical attendance, fuel, miners' tools, etc., provender for horses, where horses are used in the employment, and victuals prepared under the employers' roof and there consumed, and permits also the letting by the employer to the servant of tenements at a rent to be reserved. The second part of the section enables the employer to make or to contract to make stoppages or deductions from wages in regard to all the above matters, and also for the purpose of an advance of money for any of those purposes. The third part of the section provides that in the case of fuel, miners' tools, and horse provender, the stoppage must not exceed the real and true value of what was supplied, and then goes on to make it a condition precedent to any stoppage or deduction that there should be an agreement or contract in writing signed by such artificer.

For the defendants, Mr. Schiller submitted that the effect of this proviso was that only stoppages or deductions for fuel, miners' tools, or horse provender need be in writing signed by the plaintiff, and as authority for that proposition cited the case of *Chawner* v. *Cummings*. (1) That was a case in which the Court considered the legality of deductions in the case of knitted gloves. The worker was awarded an agreed gross price per dozen pairs, and from this price was deducted a frame rent, a standing room charge, a charge for getting materials to the plaintiff worker, payment to a boy for winding yarn, wear and tear of machinery, and certain other payments. The Court, consisting of Lord Denman C.J., Williams and Wightman JJ., held that the so-called deductions were really only a mode of regulating the amount of wages, and nothing more. In effect, what the Court decided was that the agreed gross price per dozen pairs included not merely wages, but also a sum of money which the worker used to pay for plant, standing room and various services. This view of the practices employed in the knitting trade in Leicestershire was again put forward and approved in the hosiery trade at Nottingham in the case of *Archer* v. *Jones*. (2) Both Bramwell B. and Byles J. pointed out very clearly there that in that type of case what took place was, first, an addition to the wages measured by the piece, and subsequently a deduction generally measured by time, and that the result was that there was not a failure to pay wages in current coin, for the real wages were the gross agreed price after making the deductions. But while this was the ratio decidendi in the case of *Chawner*

(1) 8 Q. B. 311.

(2) 2 B. & S. 61; 2 B. & S. 67.

v. *Cummings* (1) and was sufficient to support the judgment, Lord Denman C.J., who delivered the judgment of the Court in that case, certainly went on to deal with s. 23 of the Truck Act, 1831, in the following language: " We have already "observed that the earlier parts of the Act, up to the twenty-"third section, respect the payment of wages in goods or "otherwise than in the current coin. But this twenty-third "section was relied upon in argument on behalf of the plaintiff, "as shewing that the statute includes other transactions, and "amongst the rest deductions for rent, and that none such "are allowable except the contract be in writing, which was "not the case here. It is thereby declared that nothing in "the said Act contained shall prevent the employer from "supplying an artificer with divers articles therein enumerated "(not material to the present purpose), 'nor from demising to "' any artificer' . . . . 'the whole or any part of any tene-"' ment at any rent to be thereon reserved'; nor from making "' any stoppage or deduction from the wages of any such "' artificer for or in respect of any such rent,' provided that "such stoppage or deduction shall not exceed the 'true value "' of such fuel, materials, tools, implements, hay, corn and "' provender' (not including rent), 'and shall not be in any "' case made from the wages of such artificer, unless the "' agreement or contract for such stoppage or deduction shall "' be in writing, and signed by such artificer.' Upon the "construction of this clause, first, it may be doubted whether "there has been any 'demise' of any thing 'at a rent thereon "' reserved'; next, there is nothing to show that there has "been a demise 'of the whole or any part of any tenement,' "the conventional phrase 'frame rent,' which is used in the "case, being wholly insufficient to establish that fact; and, "lastly, as has been already noticed, the proviso which "requires a contract in writing in order to legalise a stoppage "or deduction does not include rent. We are of opinion, "therefore, that this section does not affect the question; "and that upon the whole our judgment must be for the "defendant."

---

(1) 8 Q. B. 311, 324.

1938

PRATT
v.
COOK, SON
& CO.
(ST. PAUL'S),
LD.

Wrottesley J.

Here, it is said, is a clear statement by the Court of Queen's Bench as far back as 1846, that the proviso which requires a contract in writing in order to legalize a stoppage or deduction does not include rent, and, if that be the case, the provision of medicine and medical attendance and the provision of victuals prepared under the roof of the employer and there consumed are similarly matters in respect of which deductions or stoppages can be made without the necessity of a contract in writing signed by the servant. Moreover, it was said that the case of *Archer* v. *James* (1) specifically noticed and approved the decision of the Court in *Chawner* v. *Cummings*. (2) But, in the first place, it will be seen that this passage in the judgment in *Chawner* v. *Cummings* (2) was obiter in a double sense of the word. For, if the Court was right in its analysis of the method of payment adopted in the earlier part of the judgment, then there was no question of a deduction or stoppage from wages at all, for the whole of the real wages have, in that event, been paid in current coin of the realm. It therefore became unnecessary to consider whether there were deductions which could be justified under s. 23 at all. Still more was it therefore obiter to consider the proviso to s. 23, and to say, as the Court did, first of all, that the deductions, though nominally rent, were in fact nothing of the kind, and then to go on and hold that if they were rent they were deductions which were not dealt with in that part of the proviso which required a written agreement. In any event, this question has specifically come under review in subsequent cases in which the Court has had to decide whether or not all the deductions permitted by s. 23 needed a written agreement to make them legal and valid, and both in the case of *Pillar* v. *The Llynvi Coal & Iron Co., Ld.* (3), and again in the case of *Cutts* v. *Ward* (4), the Court held that a written agreement was essential to the validity of deductions in respect of medicine and medical attendance and rent, and no distinction can, of course, be

(1) 2 B. & S. 61, 67, per Bramwell B., 110.

(2) 8 Q. B. 311.

(3) (1869) L. R. 4 C. P. 752.

(4) (1867) L. R. 2 Q. B. 357.

drawn for this purpose between the provision of medicine and medical attendance and the payment of rent and victuals. In the case of none of these is the Court given jurisdiction to inquire into the real and true value of what was provided. It seems clear to me, therefore, that the ordinary grammatical construction of the proviso must prevail, and that a written agreement signed by the servant is essential to the validity of any of the deductions mentioned in s. 23.

The next point taken by the defendants was that in fact the agreements as to wages and conditions negotiated between the union, of which the plaintiff was a member, and the association of masters, and which were applied in fact by the defendants at their warehouse, constituted an agreement signed by the plaintiff. In fact, some of these agreements were put in and proved to have been signed by Mr. Jones as an officer of the plaintiff's union, and it was contended by the defendants that the signature on behalf of a servant was a sufficient compliance with the Act. In this connection my attention was drawn to a decision in *In re Whitley Partners, Ld.* (1), where it was held that unless an Act provided otherwise in clear terms, signature by an authorized agent on behalf of a person was signature by that person. Whether this proposition applies to the signature by a workman of an agreement under s. 23 of the Truck Act, 1831, is, I think, a matter of some doubt. The whole scope of the Truck Acts contemplated, it may well be said, that deductions should not be made from a man's pay except by his consent given personally in circumstances of some formality. It is, however, unnecessary for me to decide this question, as there was no evidence before me that the defendants were really parties to any of these agreements. They were, it is true, signed by the official of the union and also signed by the association of masters, but the evidence was that the defendants refused to negotiate with the trade union direct, and insisted on all negotiations taking place between themselves and their own men. There was, therefore, no evidence before me that the defendants were themselves a party to these printed

(1) (1886) 32 Ch. D. 337.

1938

PRATT
v.
COOK, SON
& CO.
(ST. PAUL'S),
LD.

Wrottesley J.

agreements, even though they voluntarily applied the terms and conditions of the agreements to their servants.

There remains only the question what limitation of period is applicable to the claim. On behalf of the plaintiff it was urged that this was a debt on a specialty, just as the claims for calls on shares in *Cork and Bandon Ry. Co.* v. *Goode* (1) were held to be a debt upon a specialty. There is, I think, no doubt that this claim lies in debt and would formerly have been framed in one of the common indebitatus counts. In fact, it is a claim for work done for the defendants at their request, and, if contested, the plea could have been "never indebted." This, I think, is clear from the words of s. 4 of the Act of 1831, which entitles the plaintiff to recover "wages earned" in so far as they were not paid in the current coin of the realm. Then comes the question: Is it a debt upon a specialty? for, if it is, then it is an action which "shall be commenced and sued within the time and limitation "hereinafter expressed and not after; that is to say, the "said actions of . . . . debt upon any bond or other specialty ". . . . within twenty years after the cause of such actions or "suits, but not after." (Sect. 3 of the Civil Procedure Act, 1833.) It is not every right of action conferred by a statute that can be called an action for debt upon a specialty, but this action is clearly within one of the tests laid down by Jervis C.J. in the *Cork and Bandon Ry. Co.* v. *Goode* (2), "but for the act of parliament, no action could be brought by "the company against one of its own members." In that case once the plaintiff had established that the defendant was a shareholder and that a call had been made, the statute, and the statute alone, attached the liability to the defendant. Similarly here, the plaintiff, once he establishes that he is a labourer within the terms of the Act, has only to establish the matters set out in ss. 3 and 4 of the Act, and the liability is attached to the defendants. This is clearly laid down by Slesser L.J. in the case of *Kenyon* v. *Darwen Cotton Manufacturing Co.* (3) in the following passage: "Moreover, by "s. 3 of the 1831 Act, there being an obligation actually

(1) (1853) 13 C. B. 826.
(2) Ibid. 834, 835.
(3) [1936] 2 K. B. 193, 206.

"to pay the wages in such coin of the Realm, every payment "in respect of such wages otherwise than in the current coin "of the Realm being declared illegal, null, and void, it follows "that both the contract and the payment (in so far as it "was otherwise than in coin) were alike ineffectual. On this "finding, s. 4 of the 1831 Act comes into operation, and "the plaintiff, by statute, became entitled to recover so much "of her wages as had been actually paid not in current coin. "Her claim therefore succeeds."

This is not, therefore, a case where the Act merely enables the plaintiff to sue on a contract or a cause of action dehors the statute. The distinction is well illustrated in the case of *Gutsell* v. *Reeve* (1), where Lord Wright, after a careful examination of the case of *Cork and Bandon Ry. Co.* v. *Goode* (2) distinguishes that case from the facts then under discussion. Those facts were that the plaintiff had, in breach of the Agricultural Wages Regulation Act, 1924, been paid less than the minimum wages prescribed by law under that Act. Under that Act no such right of action was given as is given under the Truck Act of 1831. The employer who paid less than the minimum rate was liable on summary conviction to the payment of a fine, and in addition could be ordered by a court of summary jurisdiction to pay in addition the shortage for a period of six months prior to the information. In certain circumstances, he could be ordered by the same Court to pay the shortage over eighteen months. In the case in question the plaintiff pursued neither of these remedies, but relied on sub-s. 9 of s. 7 of that Act: "The powers "given by this section for the recovery of sums due from an "employer to a worker shall not be in derogation of any right of "the worker to recover such sums by civil proceedings." In the course of his judgment Lord Wright said (3): "It is not "contended that the whole agreement, or the whole employ"ment, is to be abrogated and swept aside. If that is the "true position, then I think it is clear that the matter stands "outside the ruling of *Cork and Bandon Ry. Co.* v. *Goode*." (2)

(1) [1936] 1 K. B. 272.
(2) 13 C. B. 826.
(3) [1936] 1 K. B. 283.

That passage shows how different was that case from this one, where the whole contract is swept aside. In the result, therefore, it was held by the Court in that case that the claim was upon a contract of employment and not a mere claim upon a statute. It would appear, therefore, that in that case the claim was not debt upon a statute, if indeed it was a claim of debt at all. Similarly, *Aylott* v. *West Ham Corporation* (1) was an action which could only have been brought after the passing of the Local Government Emergency Provisions Act of 1916. But all that that Act did was to enable a local authority to make payments to their servants who had left their employment in order to join His Majesty's Forces. Without an Act of Parliament such payment would have been ultra vires the local authority. The action, nevertheless, was an action upon a promise made after the passing of the Act and which would not have been a binding promise but for the Act.

In the case before me it is only necessary for me to look at the statute in order to find the liability, and in my view, therefore, the plaintiff is right in saying that this claim is for debt upon a specialty—namely, the Act of Parliament, the Truck Act of 1831. Incidentally this disposes of the defendants' submission that the plaintiff's claim was in the nature of " an action for "penalties, damages or sums of money given to the party "grieved by any statute now or hereinafter to be in force," and that therefore the appropriate period was two years. At first sight the above words " sums of money given to the "party grieved by any statute " would seem to be a fair description of the plaintiff's rights in this action. But these words have been defined by the Court of Appeal in *Thomson* v. *Lord Clanmorris* (2) to mean sums of money given by way of penalty or punishment, not by way of compensation to the person injured, although he might put some of it in his pocket: see per Lindley M.R. (3)

What is done by ss. 3 and 4 of the Truck Act, 1831, is not to impose penalties, but to wipe out payments of wages made

(1) [1927] 1 Ch. 30.
(2) [1900] 1 Ch. 718.
(3) [1900] 1 Ch. 725.

otherwise than in current coin of the realm, and to enable the recipient of such wages to recover his earnings in money.

From time to time, in the course of the case, the defendants endeavoured to reinforce their arguments by submitting that it was the duty of the Court to treat the Truck Acts as penal legislation, and, therefore, to construe them strictly giving the benefit of any doubt to the defendants. In the circumstances of this case it is not surprising that a submission of this kind should be made; but I have not thought myself at liberty to construe the relevant statutory provisions in a narrow sense, or so as to limit their scope. It appears to me that in passing the Truck Acts in their present form, Parliament, in order to prevent the abuses to which certain practices had led, struck at the practices and abolished them, except as regards those cases where they still permitted them, and even then subject to the safeguards which Parliament imposed. This view of this legislation was pronounced by Bramwell B. and Byles J. in the case of *Archer* v. *James* (1); and the Court of Appeal appear to have taken the same view of this legislation in *Kenyon* v. *Darwen Cotton Manufacturing Co.* (2) following the judgment of the House of Lords in *Penman* v. *Fife Coal Co., Ld.* (3) In the case of *Kenyon* v. *Darwen Cotton Manufacturing Co.* (2) the practices pronounced illegal had no trace of oppression. I have therefore thought it right to endeavour to construe the statutory provisions concerned according to their ordinary and plain meaning, without endeavouring either to extend or diminish their scope. In the result, therefore, there must be judgment for the plaintiff for the amount claimed with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Corbin, Greener & Cook.*
Solicitors for the defendants: *J. N. Mason & Co.*

(1) 2 B. & S. 61, 67.
(2) [1936] 2 K. B. 193.
(3) [1936] A. C. 45.

T. W. M.

C. A.

1938
Feb. 3, 24.

DAY *v.* DAVIES.

Distress—Arrears of rent—Bailiff in possession—Agreement between bailiff and distrainee—" Walking possession "—Charges paid by distrainee—Claim by distrainee for return of money paid to bailiff—Whether bailiff's charges valid—Effect of agreement—Statutory prohibition on fees above certain scale—Real possession only—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1—*Distress (Costs) Act,* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Law of Distress Amendment Act,* 1888 (51 *&* 52 *Vict. c.* 21), *s.* 8—*Distress for Rent Rules,* 1920, *S. R. & O., No.* 1712/*L.* 47, *r.* 22; *Appendix II., Scale II.* (2.).

D., a bailiff, having distrained on the goods and chattels of the plaintiff for arrears of rent due in respect of certain premises, the plaintiff on the same day that he had received notice of the distraint, entered into a written agreement with D. that D., in consideration of his not leaving a man in possession, should have " walking possession," and that the plaintiff would pay all costs. D. did not go into real possession but visited the premises for a few minutes on each of five days and charged the plaintiff 6*s.* on each of the days. On the last day on which D. came, the plaintiff paid him a total sum which included 1*l.* 6*s.* for possession fees. On an application being made to the registrar of the county court by the plaintiff for the return of the sum so paid to D. for possession fees, judgment was given in his favour. The county court judge on an appeal by D. having dismissed his appeal, D. now appealed to the Court of Appeal. The particular question before the Court was whether D. was entitled to charge what he did in view of the fact that he only had " walking possession " under the special agreement :—

Held (affirming the decision of the county court judge but on different grounds), that D. was only entitled to charge the amount specified in and authorized by the Distress for Rent Rules, 1920, Appendix II., Scale II. (2.), and that the fees so authorized could only be charged by a man actually in possession. No charges could be made otherwise than those provided by the Schedule. D. never was actually in possession and therefore had no power to charge, the prohibition under the Rules being absolute. The special agreement to pay a charge for walking possession could not be relied on to take the case out of the statutory rules, since, the prohibition under the statutory rules being absolute, it could not be waived by the parties or be the subject of a valid contract. Such an agreement could not be enforced and the appeal must be dismissed.

Lumsden v. *Burnett* [1898] 2 Q. B. 177 considered and distinguished.

APPEAL from a judgment of His Honour Judge Dale in the Birmingham County Court.

On April 30, 1937, one John Davies, a certified bailiff, gave notice to the plaintiff and his wife that he had that day distrained their several goods and chattels mentioned in the schedule thereto in and upon their dwelling-house at 28 Low Wood Road, Erdington, in the city of Birmingham, for 5*l.* 10*s.*, being arrears of rent due to the landlord, the Pearl Estates, Ld. On the same day the plaintiff agreed with John Davies that in consideration of his not leaving a man in possession, he should have what was called a "walking possession." The agreement was in the following terms: "To John Davies, In consideration of you holding possession "at 28 Low Wood Road under distress for rent, please do "not leave man in possession but holding walking possession, "and I will pay all costs, being for my convenience." The plaintiff signed the agreement. The county court judge said in the course of his judgment that in fact the bailiff "never "put a man in possession at all, but merely visited the plaintiff's "premises daily for a few minutes on each of five days"; and he continued: "This method of taking possession, I am "told, is often done, and is known as 'constructive possession' "or 'walking possession.'"

The bailiff proceeded to charge 6*s.* on the first day and for five subsequent days, a total of 1*l.* 16*s.* On the last day on which the bailiff came, the plaintiff paid him 4*l.* 10*s.* This sum included 1*l.* 6*s.* in respect of possession fees during the currency of the distress. The balance of 10*s.* was not paid at the time and the defendant Davies did not trouble about it. The plaintiff's claim was that this sum of 1*l.* 6*s.* should be returned to him out of the money paid, being the amount which he actually paid in respect of the fees and charges for six days at 6*s.* a day less the 10*s.* The matter having come before the registrar of the county court on a claim by the plaintiff against Davies for the repayment of the sum of 1*l.* 6*s.*, and the registrar having given judgment in his favour, the defendant appealed to the county court. The county court judge dismissed the defendant's appeal on the ground that no amount was fixed in the agreement, and 6*s.* a day was not a reasonable amount; but he granted leave to appeal to the Court of Appeal. The defendant Davies now appealed. The appeal was heard on February 3, 1938.

H. J. Astell Burt for the appellant. The question now before the Court is whether the appellant had the right to charge what he did while he held what is termed "walking possession." The leading case on "walking possession" is that of *Lumsden* v. *Burnett.* (1) In the case now before the Court the plaintiff did enter into an agreement with the appellant: see on this question of an agreement A. L. Smith L.J.'s remarks (2) and Chitty L.J. (3); and also *Robson* v. *Biggar* (4), per Lord Alverstone C.J. The parties can contract out of the particular Act authorizing the appropriate fee and agree that, notwithstanding the possession is not actual possession, "walking possession" may be substituted and considered equivalent to real possession. Compare also *Walker* v. *Retter* (5), a case where it was held that the Lord Chancellor had power under s. 8 of the Law of Distress Amendment Act, 1888, to make rules authorizing a certain scale of charges superseding a prior scale.

With regard to statutory enactments, though s. 1 and the Schedule of the Distress (Costs) Act, 1817, may seem contrary to my contention, it is submitted that the statute only extended to what the landlord can do under his common law rights. The appellant's action here in taking this money cannot be the unlawful taking of money by a man when not in possession. A man can contract out of the Act. This Act of 1817 must be read in the light of the new Rules of 1920, Appendix II., Scale II. (2.), which superseded the scale in the 1817 Schedule

B. Stuart Horner for the respondent was not called upon.

The Court (SLESSER, SCOTT and CLAUSON L.JJ.) intimated that the appeal would be dismissed and that the Court would give their reasons at a later date.

1938. Feb. 24. SLESSER L.J. This case is of considerable importance to bailiffs and those who are reluctantly compelled to entertain them. [His Lordship stated the facts.]

(1) [1898] 2 Q. B. 177, 185, 186.
(2) Ibid. 185.
(3) Ibid. 185, 186.
(4) [1907] 1 K. B. 690, 693.
(5) [1911] 1 K. B. 1103.

The case first came before the registrar in the county court, who held that the bailiff had no right to charge 6*s*. a day during the time in which he held only "walking possession." There was an appeal to the county court judge, who upheld the decision of the registrar. From this decision the defendant, the bailiff, now appeals to this Court.

In the county court, the question whether on any view the plaintiff could recover the money so paid by him to the bailiff, even if he were right in his contention that the bailiff in law was not entitled to payment, was not argued; nor does that consideration form any part of the learned county court judge's judgment. Mr. Astell Burt for the defendant does not take the point, saying that he desires rather to have the case decided upon the footing that, if he is wrong in his contentions, the plaintiff would be entitled to the recovery of his money. I come therefore at once to the issues litigated in this case before the learned county court judge.

In the case of there being a man lawfully in possession, the right to charge has been made the subject of legislation and of rules. By the Distress for Rent Act, 1737, s. 10, it was provided that distress may be secured and sold on the premises. Before that time, distress generally could not be impounded on the premises unless the tenant otherwise agreed, and as a consequence of this legislation it became usual to put a man into possession. The costs of distress levied for payment of small rents was first regulated by the Distress (Costs) Act, 1817, which, by s. 1, provided, so far as here material, that "no person whatsoever making any distress for rent, where "the sum demanded and due shall not exceed the sum of "twenty pounds for and in respect of such rent, nor any "person whatsoever employed in any manner in making such "distress, or doing any act whatsoever in the course of such "distress, or for carrying the same into effect, shall have, "take, or receive out of the produce of the goods or chattels "distrained upon and sold, or from the tenant distrained on, "or from the landlord, or from any other person whatsoever, "any other or more costs and charges for and in respect of "such distress, or any other matter or thing done therein, "than such as are fixed and set forth in the schedule . . . . ; "and no person . . . . shall make any charge whatsoever for "any act, matter, or thing mentioned in the said schedule, "unless such act shall have been really done." The material words in the schedule are " man in possession, per day, 2*s.* 6*d.*"

By the Distress (Costs) Act, 1827, these provisions were extended to distress for taxes, rates, tithe, etc., where the sum did not exceed 20*l.*, and finally by the Law of Distress Amendment Act, 1888, s. 8, it was provided that the Lord Chancellor might from time to time make, alter and revoke rules " (2.) for regulating the fees, charges and expenses in "and incidental to distresses." Such rules as concerned rent were made under the Distress for Rent Rules, 1920, Statutory Rules and Orders, No. 1712/L.47, and provided by r. 22 that no person shall be " entitled to any fees, charges, or "expenses for levying a distress, or for doing any act or thing "in relation thereto, other than those specified in and "authorised by the table in Appendix II. to these Rules." The material one now is Scale II. (2.) " for man in possession, "6*s.* per day ; to provide his own board in every case."

In *Walker* v. *Retter* (1) it was held by the Divisional Court that these rules (or rather those then extant in similar terms) were not ultra vires and no suggestion is now made that that case was wrongly decided. The critical words here are those contained in r. 22 that " no person shall be entitled to "any fees, charges or expenses for levying a distress, or for "doing any act or thing in relation thereto, other than those "specified in " the Appendix which I have already quoted.

The legal effect of " walking possession " was discussed in the case of *Lumsden* v. *Burnett* (2) in this Court. In that case, the " walking possession," as it was there called, was described by A. L. Smith L.J. to be a condition "when "in truth and in fact the man had not been really in "possession, but at the most has been in constructive possession "of the goods distrained." As the learned judge points out (3) : " where a sheriff goes out of possession and the

(1) [1911] 1 K. B. 1103.

(2) [1898] 2 Q. B. 177, 179, 182, 185.

(3) [1898] 2 Q. B. 182.

"point arises as to whether he has abandoned possession "or not, the question always is one of fact. . . . . A sheriff "in some circumstances may go out of possession and again "re-enter without having abandoned possession, and the "question always is whether what he has done amounts to "an abandonment of possession." Dealing with the document there signed, which though ampler in terms as to the right to re-enter at any time upon the premises (here the matter is compendiously dealt with in the phrase "holding walking possession"), Chitty L.J. (1) said: "Taking into consideration the document [on the question of abandonment], "but merely for the limited purpose above stated, and the "other undisputed facts relating to the watching of the shop "by the defendant's man, and his occasional entrances to see "that the goods had not been removed, I say unhesitatingly "that the possession was not abandoned." The same view has been taken on the facts of the present case by the learned county court judge when he refers to this constructive possession as "a method of taking possession." Whether the matter be founded upon r. 22 of the 1920 Rules, which I have cited, that all the acts of the bailiff were done in relation to levying distress, or whether it be founded upon the language of the Distress (Costs) Act, 1817, s. 1, that he was doing acts "in the course of such distress, or for carrying the same "into effect," in either case I am of opinion that he cannot be entitled to any charges other than those specified in and authorized by the table of Appendix II., Scale II. (2.), of the 1920 Rules which has superseded the Schedule to the 1817 Act. Now that Schedule only provides, so far as regards matters here material, for a fee for a man in possession; and as in this case no man was in possession, no provision is made entitling him to any fee. This view, apart from any question of special agreement, has already been held by this Court in *Lumsden* v. *Burnett* (2), where it was held that where goods and chattels are distrained for taxes less in amount than 20*l.*, the collector who distrains has no right to the statutory charge for a man in possession unless he has remained in

---

(1) [1898] 2 Q. B. 185.

(2) Ibid. 177, 182, 185, 186.

C. A.
1938

DAY
v.
DAVIES.

Slesser L.J.

real possession. In that case, the agreement purporting to give a right to walking possession had been signed by the plaintiff's daughter and it was held by the Court that consequently the plaintiff did not agree to the walking possession or to the charges which the alleged agreement purported to authorize; and, it being held that there was no real possession, he succeeded in his action to recover the charges of 2*s.* 6*d.* per day which was then the authorized charge under the Act of 1817. In that case undoubtedly there are obiter dicta by both the judges that it would have been competent for the plaintiff to have made a special arrangement to pay the 2*s.* 6*d.* per diem even though the bailiff did not remain in real possession. A. L. Smith L.J. (1) says: "I do not see "why such a taxpayer may not agree with a collector, if "the former desires neither to pay the tax due nor to suffer "the inconvenience of having a man in real possession, to "pay the 2*s.* 6*d.* per diem to the collector, even though the "man does not remain in real possession; but unless such "an agreement is made, I am clear that the collector cannot "claim the 2*s.* 6*d.* per day if the man does not remain in "real possession." And Chitty L.J. (2) says: "The "statute does not preclude the tenants and persons for whose "benefit it was made from contracting themselves out of those "benefits. It would often be to the advantage of the person "upon whose goods the distress is levied for a sum which he "is not prepared to pay at once to get rid of the inconvenience "of having the bailiff's man in actual possession; and I can "see no valid reason why he should not be at liberty to contract "to pay the 2*s.* 6*d.* a day for the man in constructive possession. "To hold that he cannot so contract would inflict upon him "unnecessary inconvenience." These dicta have seriously to be considered here where such an agreement is relied upon.

In *Robson* v. *Biggar* (3), the appellant, who was the landlord, had agreed on a printed form as follows: "I also consent "to your deducting 5 per cent. as commission over and above "the statutory costs allowed on the amount recovered."

---

(1) [1898] 2 Q. B. 185.
(2) Ibid. 186.
(3) [1907] 1 K. B. 690.

C. A.
1938
DAY
v.
DAVIES.
Slesser L.J.

This she declined to pay on the ground that under the Act of 1817 and the Act of 1888, no person should be entitled to any fees for levying distress other than those specified in the Act or rules. Lord Alverstone C.J. and Ridley J. came to the conclusion—Darling J. dissenting—that the statute was not concerned with special bargains made between the parties. And the learned judge in the present case felt himself bound by that authority. The particular case to which I have referred of *Lumsden* v. *Burnett* (1) was not cited. This decision is of course not binding upon us, and the observations of the two members of the Court of Appeal in *Lumsden's* case (1) were made obiter; but now that the matter has been expressly raised in this Court I feel that it must be directly dealt with, giving due consideration to the weighty judgments of the learned judges in *Lumsden's* case. (1)

In my view once it is determined that all the acts in the constructive walking possession are acts in the course of the distress or the carrying of it into effect or acts done in relation to levying distress, it follows that no charges may be made other than those provided in the Schedule; and there being in fact no man in possession within the meaning of that provision, there is no power to charge, but on the contrary, a direct prohibition. Sect. 2 of the 1817 Act supports this view: that section provides: "if any person . . . . shall ". . . . take . . . . from any person or persons whatsoever, ". . . . any other or greater costs and charges than are "mentioned and set down in the said schedule or make any "charge whatsoever for any act, ... mentioned in the said "schedule, and not really done . . . ." they may apply to the justices of the peace, who may order and adjudge treble the amount of moneys so unlawfully taken to be paid by the person so having acted to the complainant.

In the present case it would appear that the charge which is made is, if based upon an act mentioned in the Schedule, namely for a man in possession, a charge for "an act not really done" and the charge is therefore unlawful. The combined effect of ss. 1 and 2 of the 1817 Act and the Rules under the Act of 1888 appear to me to amount to a prohibition—to charge only for acts mentioned in the sections really done—and there is no power to charge at all for any other act done in making the distress. As to reliance upon any special agreement, where a prohibition under a statute is absolute, it (the statute) cannot be waived by the party for whose benefit it is made: *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1) If an act be prohibited, it cannot be the subject of a valid contract: per Bramwell B. in *Cowan* v. *Milbourn.* (2) No special agreement as to charges for an act of distress otherwise than those permitted by the Legislature or rules can be made, and the agreement relied upon to justify a charge for "walking possession" cannot be enforced.

---

(1) [1898] 2 Q. B. 177.

The learned county court judge, who was of opinion, which I hold to be erroneous, that the parties might make a special agreement to deal with constructive possession, has nevertheless come to the conclusion that the document actually signed by the plaintiff is of no effect because no amount of charge is mentioned. He adds: "If I have to consider what is a "reasonable fee for a few minutes in a day, I certainly do "not think that 6*s*. per day would be a reasonable figure."

In my view of the case that question does not arise, because for the reasons I have endeavoured to state, there was no power in the circumstances for the bailiff to make any agreement to charge at all, either under the statute of 1817 or under the Rules of 1920 or by any special agreement. For reasons different from those of the learned judge, I nevertheless agree with his conclusion and this appeal will therefore be dismissed with costs.

SCOTT L.J. I agree, and I have nothing to add.

SLESSER L.J. Clauson L.J. also states that he agrees.

Solicitors: *R. H. King & Co., for T. W. Walthall & Pritchard, Birmingham; Church, Rendell, Bird & Co., for Springthorpe, Holcroft & Bishop, Birmingham.*

A. R. LL.-T.

---

(1) [1908] 1 Ch. 743.

(2) (1867) L. R. 2 Ex. 230, 236.

ASSOCIATED DISTRIBUTORS, LIMITED *v.* HALL.

C. A.
1938
Feb. 3, 4.

Hire purchase—Agreement for letting on hire—Tandem bicycle—Model form of agreement—Payments by instalments—Option for hirer to return goods before all instalments paid—Exercise of right by hirer—Liquidated damages or penalty—" Minimum payment " clause—Right of owner to claim for user under terms of agreement.

H. hired, under the terms and conditions of a hire purchase agreement, a tandem bicycle for the term of fifty-three weeks at small weekly payments.

By cl. 5 of the agreement H. was given an option of terminating the hiring at any time by returning the bicycle but remaining liable for the rent up to the date of the return and for all other sums payable under the agreement and damages (if any) for any breach of any term of the agreement. By cl. 7 it was agreed that in the event of the hiring being determined no allowance or credit, etc., should be allowed to H., but he was to pay by way of compensation for depreciation of the goods in addition to any other sums payable thereunder such sums as with the amount previously paid for rent should make up a sum equivalent to not less than one-half of the total amount including the option purchase price payable under the agreement.

H. having returned the bicycle in pursuance of cl. 5 after having paid only one instalment, the plaintiffs claimed a sum of 6*l.* 16*s.* 6*d.*, being as to 1*l.* 4*s.* arrears of rent, and as to 5*l.* 12*s.* 6*d.*, the further sum due under cl. 7. The county court judge having disallowed the latter amount as being a penalty, but having awarded the plaintiffs the sum of 1*l.* 15*s.* as damages in lieu thereof, the plaintiffs now appealed :—

Held (reversing the decision of the county court judge), that no question as to the plaintiffs' claim under cl. 7 being liquidated damages or in the nature of a penalty arose, and therefore the money for which the hirer had made himself liable had to be paid and the claim could not be impeached on any principle of law.

APPEAL from a judgment of His Honour Judge E. H. Longson sitting in the Alfreton County Court.

The action concerned a claim by the plaintiffs, who carried on a hire-purchase business, against the defendant, the hirer of a tandem bicycle under the terms of a hire purchase agreement, for certain sums which they alleged were due from the hirer on his returning the bicycle after only one instalment had been paid. The learned county court judge dealt also with three other similar cases.

The agreement (which was similar to other forms of agreement used by many firms carrying on the same kind of business and in the same area as the plaintiffs) contained (inter alia) the following clauses :—

"1. I agree to hire from you the goods specified in the "schedule hereto (hereinafter called 'the goods') for a period "of 53 weeks from the date of this agreement.

"2. I enclose initial hire rent of 1*l.* 10*s.* 0*d.* and agree to pay "to you at the above address or at such other address as you "may require in writing 52 further consecutive weekly "rents of 6*s.* (unless the agreement shall be determined as "hereinafter provided) the first rent to be paid one week from "the date of this agreement and the remaining rents on the "same day in each consecutive week thereafter.

. . . .

"5. I may at any time terminate the hiring by returning "the goods to you at such address as you may direct at my "own risk and cost, but I shall remain liable for rent (including "apportioned rent for any broken period) up to the date of "such return and for all other sums payable under this "agreement and damages (if any) for breach of any term or "condition thereof.

"6. If I default in payment of any sums due hereunder "or if I commit any breach of any term or condition of this "agreement you may :—

"(*a*) Determine the hiring and forthwith resume possession "of the goods . . . . but nevertheless I shall remain liable "to you for any sums due under this agreement and for any "antecedent breach of any terms hereof . . . .

"7. In the event of this agreement or the hiring being "determined for any cause whatsoever, no allowance return "credit or payment shall be allowed or paid to me but "I will pay to you by way of compensation for depreciation "of the goods in addition to any other sums payable hereunder "such sums as with the amount previously paid for rent "shall make up a sum equivalent to not less than one-half "of the total amount including the option purchase price "payable under this agreement."

By cl. 8 an option was given to the hirer of purchasing the goods for 1*s*. payable within thirty days from the expiration of the hiring, if all the terms and conditions of the agreement had been duly fulfilled and the total hire rent amounting to 17*l*. 4*s*. had been punctually paid, with the usual result if the option was not exercised or the purchase price paid.

The agreement was for a total sum of 17*l*. 4*s*. as the total hire purchase of the bicycle. The hirer having returned the bicycle in pursuance of cl. 5 of the agreement after having only paid one instalment, the plaintiffs in an action in the county court claimed a sum of 6*l*. 16*s*. 6*d*., being as to 1*l*. 4*s*. arrears of rent and as to 5*l*. 12*s*. 6*d*. the further sum due under cl. 7. The county court judge in a reserved judgment held that the plaintiffs were entitled to 1*l*. 4*s*., arrears of rent, but not for the other sum of 5*l*. 12*s*. 6*d*., which, in his opinion, was a penalty, but that they could recover 1*l*. 15*s*. as damages for depreciation in lieu thereof. Leave to appeal having been granted the plaintiffs now appealed on the ground (inter alia) that the county court judge was wrong in law in holding that the sum of 5*l*. 12*s*. 6*d*. was a penalty and therefore irrecoverable.

Eric Sachs for the appellants. The question really concerns the meaning of cl. 7 of the agreement: Is this a penalty clause and unenforceable? It is submitted that in this particular case now before the Court, the hirer had merely exercised the option given him by cl. 5 to put an end to the contract of hiring on paying a certain sum. Whether the case was one of liquidated damages or a penalty need not therefore be considered. There is no reported case on this particular point. If the Court should be against this contention, then, on the question whether it was a penalty or liquidated damages, it is submitted that it was liquidated damages; compare the judgments in the three unreported cases printed in Jones and Proudfoot on Hire Purchase Law, (1937) 2nd ed., at pp. 107, 119 and 124. This particular clause in this kind of contract is known as a "minimum payment" clause and is usually inserted in these hire purchase agreements. Most hirers know of it and agree to it without question.

A. M. S. Stevenson for the respondent. There is great inconsistency in the wording of the clauses of this kind of contract. The appellants' contention is not well founded.

SLESSER L.J. This appeal must be allowed. The learned county court judge considered the particular case which we have here with three other cases. They all arose out of hire purchase agreements, as they are called, in the form substantially of the agreement in the one which we have here to examine. They all turn in particular upon the construction of cl. 7 of the agreements, into one of which the defendant has entered. The agreement, which was for the hiring of a Sheffield Dunelt bicycle of a tandem type with a three-speed gear, was for the sum of 15*l.* 19*s.* 6*d.* together with extras, 1*l.* 4*s.* 6*d.*, making 17*l.* 4*s.* in all as the total hire purchase of the bicycle. By cl. 1 of the agreement the hirer agreed to hire the goods for a period of fifty-three weeks. He enclosed an initial hire rent of 1*l.* 10*s.* and agreed to pay "at the above address," which was the address of the company, or at such other address as may be required, fifty-two further consecutive weekly rents of 6*s.* and one payment of 2*s.* There followed certain obligations as to his keeping the goods in good order and condition and punctually paying the rent and other obligations which need not be considered in this case. Then followed in cl. 5 these words: "I may at any "time terminate the hiring by returning the goods to you "at such address as you may direct at my own risk and "cost but I shall remain liable for rent (including "apportioned rent for any broken period) up to the date "of such return and for all other sums payable under this "agreement and damages (if any) for breach of any term "or condition hereof." To that is added by cl. 7 this rider: "In the event of this agreement or the hiring being "determined for any cause whatsoever, no allowance return "credit or payment shall be allowed or paid to me but I "will pay to you by way of compensation for depreciation "of the goods in addition to any other sums payable "hereunder such sums as with the amount previously paid "for rent shall make up a sum equivalent to not less than "one-half of the total amount including the option purchase "price payable under this agreement." Now this hirer in fact did terminate his hiring under cl. 5 of the agreement and thereby it was said that he became liable to pay the sum mentioned in cl. 7 of the agreement.

The difficulty in this case has arisen from the fact that cl. 7 of the agreement contemplates, not only a termination of the hiring by the hirer, which is an option which the hirer is entitled to exercise on the conditions set out in cl. 7 with consequences following, but also contemplates that the agreement may be terminated by the owner under the conditions of cl. 6, which are as follows: "If I,"—that is the hirer—" default in payment of any sums "due hereunder or if I commit any breach of any term or "condition of this agreement you"—that is the owner—"may," determine the hiring. There has been a number of cases, none of which has apparently been reported otherwise than as an appendix in the notes on Hire Purchase Law, 2nd ed., by Jones and Proudfoot, all of which turned upon cl. 6, that is to say, where there has been a default in payment or a breach of a term or condition and the agreement itself has been determined by the owner. In such cases, as in the others here before the county court judge, the question has arisen whether the sum which the owner may claim by way of compensation for depreciation of the goods, in addition to any other sums payable as provided in cl. 7, is liquidated damages or a penalty. The cases as I understand them—two in the Divisional Court and a decision in the Court of Appeal—seem to establish the view that they are to be regarded as liquidated damages, but it is not necessary in the present instance for us to express any opinion upon those decisions, because they have nothing to do with the particular case which we are here to determine, for here the hirer, not the owner, terminated the hiring. He has exercised an option and the terms on which he may exercise the option are those set out in cl. 7. The question therefore whether these payments constitute liquidated damages or a penalty in the instances mentioned does not arise in the present case.

Now the learned judge having heard one case where the hirer had elected to terminate and other cases where the owner had taken advantage of cl. 6 by reason of some default, appears to have treated all the cases as cases appropriate to cl. 6, being cases in the nature of default, and not as cases where the hirer exercised an option, and in the absence of authority such as has been cited to us, for which one can well forgive him, seeing first of all as it appears from his note that no authorities were cited; and secondly that they are only to be obtained by industrious researches into text books (none of them having been reported), came to the conclusion that these provisions in cl. 7 for a payment as compensation for depreciation of the goods were in the nature of a penalty. He appears to have been struck by the fact that if they were a genuine pre-estimate of damage, the peculiar circumstance follows that the more the goods were depreciated the less the damage, which seemed contrary both to natural and economic law. But however that may be, he evidently did not regard the fact that the particular case we have here to consider was a case of payment with the exercise of an option. It follows in this case that no question of penalty or liquidated damage arises at all, and therefore the money for which the hirer has made himself liable must be paid and the claim cannot be impeached on any principle of law. The appeal therefore must be allowed.

SCOTT L.J. I agree. I should merely like to add this, that although the learned judge of the county court dealt with three other cases at the same time and put his judgment in all four cases into one single judgment, we are expressing no opinion at all on the other three cases which have not been before us. But in regard to this case I think he gave his judgment upon a complete misapprehension of the application of the facts to the particular agreement in question, and I entirely agree with what Slesser L.J. has said.

CLAUSON L.J. I agree. I would only venture to add this. The form of contract before us is so framed that the young person who, wanting to hire a bicycle, enters into it, is in any event liable to pay sooner or later one-half of the total purchase price, even if in fact he uses the bicycle only for a short period. We are told by counsel that the clause which has this effect is commonly known amongst those familiar with these matters as the "minimum payment" clause. I venture to suggest that it would save much misunderstanding, and would certainly conduce to the reputation as honest traders of those who hire out bicycles under these circumstances, if they were to take steps whenever this form of contract is used, to make it clear by a statement on the face of the contract, that the young person who enters into it is under the liability I have indicated.

SCOTT L.J. I should like to say that I agree with what Clauson L.J. has said.

Solicitors: *Peacock & Goddard, for E. V. Brown, White & Pears, Nottingham; Wrinch & Fisher, for Rickards & Cleaver, Alfreton.*

A. R. LL.-T.

K. B. D.
1937
Nov. 16.

C. A.
1938
Jan. 12.

In re COUNTER'S PETITION.

BUCKINGHAM *v.* COUNTER.

Local Government—Rural District—Election of Councillors—Alleged illegal practice—Election petition—Time expiring on Bank holiday—Presentation of petition on following day—Whether in Time—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 100, *sub-ss.* 1, 2, 3*—Municipal Election Rules,* 1883, *r.* 38*—Municipal Elections* (*Corrupt and Illegal Practices*) *Act,* 1884 (47 *&* 48 *Vict. c.* 70), *s.* 25, *sub-s.* 1 (*as adapted and altered by the Rural District Councillors Election Rules,* 1934 (*S. R. & O.* 1934, *No.* 546), *r.* 5, *sub-r.* 5), *s.* 30*—Municipal Elections* (*Corrupt and Illegal Practices*) *Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 7), *s.* 1, *sub-s.* 1 ; *s.* 2*—Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 40, *sub-ss.* 1, 2 ; *s.* 295.

An election of rural district councillors was held on April 5, 1937. The period of six weeks allowed for presenting election petitions ended on May 17, which was a bank holiday. On May 18 a petition was presented against one of the successful candidates alleging that he had committed an illegal practice contrary to the Municipal Corporations (Corrupt and Illegal Practices) Act, 1911, s. 1. The Local Government Act, 1933, s. 295, sub-s. 1, provides: " Where . . . . the last day on which any thing is " required or permitted by or in pursuance of this Act to be done " is [any of certain specified days one of which is a bank holiday] " the requirement or permission shall be deemed to relate to the " first day thereafter which is not one of the days before " mentioned."

Hawke J. in Chambers refused to strike out the petition as out of time, holding that this sub-section applied.

On appeal by the respondent :—

The Divisional Court struck out the petition, holding that the sub-section did not apply.

On appeal by the petitioner :—

Held, by the Court of Appeal, that the petition was presented within the time required by the statutes; that the effect of s. 40, sub-s. 2, of the Local Government Act, 1933, was to incorporate the enactments there enumerated with the Act of 1933, so as to make the presentation of a petition in accordance with those Acts a " thing required or permitted by or in pursuance of " the Act of 1933, to which s. 295 applied; and, further, that r. 38 of the Municipal Election Petition Rules, 1883, had no bearing on the question within what time a rural district council election petition might be presented, but dealt only with the mode of filing the petition on a day when the Master's office was closed owing to a holiday at the Supreme Court.

APPEAL from Hawke J. at Chambers to the Divisional Court, and further appeal from the Divisional Court to the Court of Appeal.

On April 5, 1937, an election of rural district councillors took place for the parish of South Tawton, Okehampton, Devon, the candidates being Mr. Frederick Robert Buckingham, Miss Elizabeth Blanche Counter, and three other persons, and Mr. Buckingham and one of the said other persons were declared to be duly elected.

By the Rural District Council Election Rules, 1934, r. 5, sub-r. 5, made under the Municipal Corporations Act, 1882, (1) an election petition complaining of an election on the ground of an illegal practice may be presented at any time within six weeks after the day of the election.

In the present case the last day of that period of six weeks was May 17, 1937, which was Whit Monday, a bank holiday.

On the following day, May 18, 1937, Miss Counter presented a petition against Mr. Buckingham as respondent alleging that he before and during the election, for the purpose of affecting her return at the election, by himself and his agent and by other persons on his behalf, made and published false statements of fact in relation to the personal character and conduct of the petitioner, such acts constituting an illegal practice within the meaning of the Municipal Elections (Corrupt and Illegal Practices) Act, 1911, s. 1, sub-s. 1 (1), and praying that it might be determined that he was not duly elected and that the election was void.

The respondent thereupon made an application in the High Court to dismiss the petition on the ground that it was out of time.

On June 7, 1937, Hawke J. at Chambers made an order dismissing that application on the ground that the matter was governed by s. 295 of the Local Government Act, 1933, and not by r. 38 of the General Rules made in 1883 by the judges for the time being on the rota for the trial of Parliamentary election petitions, under s. 100, sub-s. 1, of the Municipal Corporations Act, 1882. (1)

---

(1) The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 100, sub-s. 1: "The judges for the "time being on the rota for the "trial of parliamentary election "petitions, may from time to time "make, revoke, and alter General "Rules for the effectual execution "of this Part [Pt. IV.], and of the "intention and object thereof, and

C. A.
1937

COUNTER'S PETITION, *In re.*
BUCKINGHAM *v.* COUNTER.

The respondent appealed to the Divisional Court.

R. F. G. Ormrod (*F. S. Laskey* with him) for the respondent. The petition purports to be lodged under s. 1 of the Municipal

---

"the regulation of the practice, "procedure, and costs of municipal "election petitions, and the trial "thereof and the certifying and "reporting thereon."

Sub-s. 2: "All such rules shall ". . . . while in force, have effect "as if enacted in this Act."

Sub-s. 3: "Subject to the "provisions of this Act, and of the "rules made under it, the principles, "practice, and rules for the time "being observed in the case of "parliamentary election petitions, ". . . . shall be observed, as far as "may be, in the case of a municipal "election petition."

General Rules, dated April 17, 1883, made by the judges for the time being on the rota for the trial of Parliamentary election petitions, r. 38: "When the last day for "presenting petitions . . . . shall "happen to fall on a holiday, the "petition . . . . shall be deemed duly "filed if put into the letter box at "the master's office at any time "during such day; but an affidavit, stating with reasonable "precision the time when such "delivery was made, shall be filed "on the first day after the "expiration of the holidays."

The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 25, sub-s. 1 (as adapted in its application to rural district elections by the Rural District Councillors Election Rules, 1934 (S. R. & O. 1934, No. 546), r. 5, sub-r. 5): "An election "petition complaining of an election on the ground of an illegal "practice may be presented at "any time within six weeks after "the day of election."

The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 30: "Subject to the "other provisions of this Act, the "procedure for the prosecution "of a corrupt or illegal practice ". . . . and all other proceedings in "relation thereto . . . . shall be the "same as if such offence had been "committed in reference to a "parliamentary election; . . . . and "sections fifty to fifty-seven (both "inclusive) . . . . of the Corrupt and "Illegal Practices Prevention Act, "1883, shall apply accordingly as "if they were re-enacted in this "Act with the necessary modifications, and with the following "additions:—. . . . (*b*) General rules "for the purposes of Part Four of "the Municipal Corporations Act, "1882, shall be made by the same "authority as rules of court under "the said sections" [i.e., by the Rule Committee of the Supreme Court. No rules were in fact ever made under this section, and the General Rules of April 17, 1883, remain in force for cases to which they apply].

The Municipal Elections (Corrupt and Illegal Practices) Act, 1911, s. 1, sub-s. 1: "Any "person who, or the directors of "any body or association corporate "which, before or during any "municipal election, shall, for the "purpose of affecting the return of "any candidate at such election, "make or publish any false "statement of fact in relation to "the personal character or conduct "of such candidate shall be guilty "of an illegal practice within the "meaning of the provisions of the "Municipal Elections (Corrupt and

Elections (Corrupt and Illegal Practices) Act, 1911, which incorporates the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. There is no question that the time limited by s. 25, sub-s. 1, of that Act has been modified by the District Election Rules, 1934, and that six weeks from the date of election is the material period in this case. No rules have ever been made under s. 30 of the Act of 1884 for the purposes of Part IV. of the Municipal Corporations Act, 1882. That Part (comprising ss. 77 to 104 inclusive) is the only Part incorporated in the Act of 1884, and hence in the Act of 1911.

Under s. 100 of the Act of 1882 rules were made by the judges for the time being on the rota for the trial of election petitions, and r. 38 deals with the position where the period for lodging a petition expires on a public holiday. It deals with it not by extending the time, but by directing that

---

"Illegal Practices) Act, 1884, and "shall be subject to all the "penalties for and consequences "of committing an illegal practice "in the said Act mentioned, and "the said Act shall be taken to be "amended as if the illegal practice "defined by this Act had been "contained therein."

Sect. 2: "This Act . . . . shall "be construed as one with the "Municipal Corporations (Corrupt "and Illegal Practices) Act, 1884, " . . . . "

The Local Government Act, 1933, s. 40, sub-s. 1: "An election "of district councillors shall, sub-"ject to the provisions of this Part "of this Act, be conducted in "accordance with rules (in this "Part of this Act referred to as "'district election rules') made by "the Secretary of State. . . . . "

Sub-s. 2: "At every election "regulated by district election "rules the poll shall be taken "by ballot, and Part IV. of the "Municipal Corporations Act, "1882, the Municipal Elections "(Corrupt and Illegal Practices) "Act, 1884 (other than the pro-"visions referred to in section "thirty-seven of that Act), the "Municipal Corporations (Corrupt "and Illegal Practices) Act, "1911, and the provisions of "the Second Schedule to this Act "shall, subject to such adaptations, "alterations and exceptions as "may be made by the district "election rules, apply in like "manner as in the case of an "election of councillors of a "borough."

Sect. 295, sub-s. 1: "Where "the day or the last day on "which any thing is required or "permitted by or in pursuance of "this Act to be done is a Sunday, "Christmas Day, Good Friday, "bank holiday or a day appointed "for public thanksgiving or mourn-"ing, the requirement or per-"mission shall be deemed to relate "to the first day thereafter which "is not one of the days before "mentioned."

the petition shall be put into the letter-box at the Master's office. Those rules, it is submitted, still apply.

The election here took place under s. 40 of the Local Government Act, 1933, and sub-s. 2 of that section expressly applies Part IV. of the Municipal Corporations Act, 1882, the Municipal Corporations (Corrupt and Illegal Practices) Act, 1884, and the Municipal Corporations (Corrupt and Illegal Practices) Act, 1911, to elections held under s. 40. But Hawke J. has held that s. 295, sub-s. 1, of the Local Government Act, 1933, applies. As to that, we say that where a section not mentioned in s. 40, sub-s. 2, is in conflict with a section expressly made applicable by s. 40, sub-s. 2, the latter section should prevail. Moreover, the presenting of the petition was not " something done in pursuance of *this* Act " [sc. of 1933] so as to come within s. 295, but something done in pursuance of the Act of 1911 to which r. 38 of the Judges' Rules applies. Sect. 40, sub-s. 2, of the Act of 1933, which is the only reference in that Act to election petitions, seems to contemplate that the law relating thereto is already laid down.

H. M. Pratt for the petitioner. Sect. 295 of the Local Government Act, 1933, applies, and the petition was lodged in time. It is only by virtue of s. 40 of that Act that a petition can be brought at all, because it incorporates the election provisions of other Acts. But s. 295 is perfectly general in its terms, its application is not restricted in any way.

[HILBERY J. Are you correct in saying that s. 40 " incorporates " earlier Acts? It does not say that that section is to be " read as one " with those Acts. Can its effect not be stated in one sentence : it permits you to bring a petition under those other Acts, in a case to which they did not previously apply.]

Prima facie, on a petition under s. 40 of the Act of 1933 s. 295 of that Act applies, and unless its effect is cut down by the Judges' Rules of 1883 I succeed. Rule 38 simply means " If the last day is a High Court holiday, put your petition "in the box." Sect. 295 does not clash with the rule, because the holidays on which the offices of the Supreme Court are closed are more numerous than the public holidays enumerated in s. 295. So the effect of the two together is this: If the last day is a *public* holiday mentioned in s. 295, that section applies, and the act can be done on the following day. If the last day is a *Court* holiday, but not a *public* holiday (such as the King's birthday), then r. 38 still applies. Here it was a bank holiday, so Hawke J. was right in treating it as subject to s. 295.

GODDARD J. This is an appeal from a decision of Hawke J. in Chambers, who refused an application by the respondent to strike out the petition on the ground that it was one day late. As we are differing from the judge in Chambers, I will state as fully as I can the reasons for our decision. It involves the consideration of an intricate maze of statutory provisions.

The election, as shown on the face of the petition, took place on April 5, 1937. It is agreed that the last day for the presentation of a petition, if the computation is unaffected by a bank holiday, was May 17, which was Whit Monday. The petition was presented on May 18. If Whit Monday has to be taken into account, the petition was out of time. If Whit Monday has to be excluded, it was just in time.

Mr. Ormrod has contended that the effect of a holiday on the presentation of a petition is dealt with by rules made by the judges under s. 100, sub-s. 1, of the Municipal Corporations Act, 1882. If r. 38 [which his Lordship read] applies, there can be no reasonable doubt that a holiday must be included in the computation of time, and that it does not give an extension of a day. The question is whether that rule applies, or whether the effect of legislation is to exclude holidays, if they happen to be the last day.

[His Lordship read s. 40, sub-s. 2, of the Local Government Act, 1933.] It appears to me that what that section does is to say that district elections shall be subject to election petitions. The code for bringing such petitions will be found in other Acts—namely, the Municipal Corporations Act, 1882, the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and the Municipal Corporations (Corrupt and Illegal Practices) Act, 1911, and to those Acts a petitioner must go in order to find the method of procedure.

Going back in chronological order, one finds the Act of 1911, and it was for an alleged infringement of that Act—the making of a false statement of fact in relation to the personal character or conduct of a candidate—that the present petition was presented. Sect. 2 of that Act incorporated the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and one finds that by s. 25, sub-s. 1, of that Act as amended by the District Election Rules, 1931, r. 26, sub-r. 5, the time for presenting a petition is six weeks from the date of the election.

Under s. 30 of the Act of 1884 certain sections of the Corrupt and Illegal Practices Act, 1883, are incorporated, including s. 56, which gives power to the Rule Committee of the Supreme Court to make rules for the purposes of that Act; and it is provided by s. 30 of the Act of 1884 that general rules for the purposes of Part IV. of the Municipal Corporations Act, 1882, shall be made by the same authority as rules of court under the said sections. Part IV. is the only part of the Act of 1882 which is referred to in s. 40 of the Act of 1933, and it includes s. 100, under which the rules of 1883 were made. No rules replacing or amending those rules have been made by the Rule Committee.

The result seems to be that, if those are the sections, and the only sections, which apply, it follows that the Judges' Rules of 1883 apply, and under r. 38 of those rules it is provided that if the last day is a holiday the petition can be filed by putting it in the Master's letter-box.

But Mr. Pratt argues that there are provisions which except a bank holiday, as distinct from a mere holiday in the Supreme Court, from computation, and he refers to s. 295 of the Local Government Act, 1933. [His Lordship read it.] Mr. Pratt's argument is that since it is only under s. 40 of the Local Government Act of 1933 that a petition can be presented in a district election, s. 295 applies to extend the time. The difficulty is that s. 40 does not incorporate those other Acts, but says: "If you want to present a petition you must go to "these other Acts and present it under those Acts." It is not a case where something is permitted to be done "by or "in pursuance of" the Act of 1933, and in my opinion s. 295 does not apply.

C A.
1937

COUNTER'S PETITION, *In re.*
BUCKINGHAM *v.* COUNTER.

Goddard J.

Mr. Pratt also drew our attention to s. 230 of the Municipal Corporations Act, 1882, but on that it is not necessary to express any opinion. It contains very similar provisions to s. 295 of the Local Government Act, 1933, but it cannot be prayed in aid by Mr. Pratt, because it is not incorporated in any of the relevant sections. He then says that if one turns to the rules relating to Parliamentary petitions one finds Sundays and bank holidays excluded. But they are not incorporated by s. 100, sub-s. 3, of the Municipal Corporations Act, 1882, to the extent of altering the time laid down by the rules. It may be that this is a casus omissus in that provisions relating to Sunday and other public holidays as distinct from Supreme Court holidays were not made; but I am of opinion that r. 38 of the Judges' Rules is the rule which applies, and gives effect to the fact that at the Law Courts there are several holidays which are not bank holidays. But unless we can find a rule relating to rural district elections excluding bank holidays we cannot give effect to it, and the appeal must be allowed.

HILBERY J. I am of the same opinion.

J. W. H.

The petitioner appealed to the Court of Appeal. The appeal was heard on January 12, 1938.

H. M. Pratt for the petitioner, appellant. The decision of the Divisional Court should be reversed and the order of Hawke J. restored.

It appears from a consideration of the relevant Acts and rules that the petitioner presented her petition in due time. Apart from r. 38 of the General Rules made in 1883 under the Municipal Corporations Act, 1882, which will be dealt with later, the various provisions show that the petition was not out of time. The law relating to municipal or borough elections and petitions in respect thereof is comprised in the Municipal Corporations Act, 1882, the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, the Municipal

Elections (Corrupt and Illegal Practices) Act, 1911, and the General Rules of 1883 made pursuant to the Act of 1882. The Act of 1882, s. 100, provides that rules may be made for the regulation of the practice, procedure and costs of municipal election petitions. The General Rules of 1883 made pursuant to that section contain provisions as to presenting such petitions. The Act of 1884 provides by s. 25, sub-s. 1, that a municipal election petition may be presented within the time there specified; and by s. 30 that, subject to the provisions of the Act, the procedure for the prosecution of a corrupt or illegal practice and all other proceedings in relation thereto in a municipal election shall be the same as in a Parliamentary election. As regards district council elections and petitions, the law relating thereto is contained expressly and by reference in the Local Government Act, 1933, and the Rural District Councillors Election Rules, 1934, made thereunder. The Act of 1933 contains the following provisions: Sect. 40 provides (sub-s. 1) that a district council election shall, subject to the relevant provisions of the Act, be conducted in accordance with district election rules to be made under the Act; and (sub-s. 2) that the election provisions of the Act of 1882, the Act of 1884, and the Act of 1911 shall, subject to such adaptations and alterations as may be made by the district election rules, apply to a district election in like manner as to a borough election; and s. 295 of the Act of 1933 provides (sub-s. 1) that where the last day on which anything is required or permitted by or in pursuance of the Act to be done is any of certain specified days, one of which is a bank holiday, the requirement or permission shall be deemed to relate to the first day thereafter which is not one of these days. That sub-section in effect defines the expression "last day," and says that a day subsequent to the calendar period may be the last day of the period. The Rural District Council Election Rules, 1934, being the rules made under the Act of 1933, provide by r. 5 that in the application of the election provisions of the Act of 1882, and the Acts of 1884 and 1911, to a rural district election certain alterations shall have effect, and, inter alia (sub-s. 5), that s. 25, sub-s. 1, of the Act of

1884 shall be altered so as to read that an election petition of this kind may be presented at any time within six weeks after the day of the election. On the true construction of all these provisions the later Act of 1933 and Rules of 1934, besides introducing new provisions in regard to district council elections and petitions, adapt, alter and apply to such elections the provisions of the older Acts of 1882 and 1884 relating to municipal council elections. The Act of 1933 in fact incorporates the procedure under the earlier Acts for the conduct of election petitions. That being so, anything required or permitted to be done by or in pursuance of these earlier Acts as modified by the Act of 1933 is something required or permitted to be done under the latter Act. Under the Rules of 1934, r. 5, sub-r. 5, a district election petition may be presented at any time within six weeks after the day of the election. Under s. 295 of the Act of 1933, where the last day on which anything is required or permitted by or in pursuance of the Act to be done is any of certain specified days including a bank holiday, the requirement or permission shall be deemed to relate to the first day thereafter which is not one of these days. Here, the day of the election was April 5, 1937, and the period of six weeks after that day, within which to present the petition, expired on May 17, 1937, which was Whit Monday, a bank holiday. The presentation of this election petition in accordance with the procedure prescribed by the older Acts as adapted and altered by the Act of 1933 was a thing permitted by or in pursuance of that Act to be done within the meaning of s. 295, sub-s. 1, thereof; and the last day for the presentation of the petition, namely, May 17, being a bank holiday, the petition could be presented on the first day thereafter which was not one of the days specified in that sub-section—namely, May 18. The petition having been presented on that day was therefore in time. This conclusion is in no way affected by r. 38 of the General Rules made in 1883 pursuant to the Act of 1882, which provides that when the last day for presenting petitions shall happen to fall on a holiday, the petition shall be deemed duly filed if put into the letter-box at the Master's office on that day, an affidavit of delivery being filed on the first day after the holidays. That rule by its express terms comes into operation on the last day of the period within which the petition must be presented, but it gives no assistance towards determining what is the last day of the period. It assumes that the last day has already been ascertained and merely provides that when that day happens to be a holiday the petition may be filed by putting it into the letter-box. It is submitted that in that rule the term " holiday " means one of the days specified in R. S. C., Order LXIII., r. 6, when the offices of the Supreme Court are not open. These days are not the same as those specified in s. 295 of the Act of 1933. In the present case, if May 18, which was the last day for presenting the petition, had been a holiday at the Supreme Court, the petition could have been duly filed under that rule on that day by being put into the letter-box at the Master's office ; but that day was not a holiday of any kind, and there was therefore no difficulty about presenting the petition on that day and no occasion to resort to r. 38. The petition was presented on May 18, and it was therefore in time.

F. S. Laskey and *R. F. G. Ormrod* for the respondent. The decision of the Divisional Court dismissing the petition on the ground that it was not presented in due time was right and should be affirmed.

In order to determine whether the petition was presented in due time it is necessary to consider the relevant Acts and rules. The Local Government Act, 1933, s. 40, provides by sub-s. 1 that a district council election shall be conducted in accordance with district council rules to be made under the Act ; and by sub-s. 2 that at every election regulated by district election rules Part IV. of the Municipal Corporations Act, 1882, the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, the Municipal Elections (Corrupt and Illegal Practices) Act, 1911, and the Second Schedule to the Act of 1933, shall, subject to such adaptations, alterations, and exceptions as might be made by the district election rules, apply in like manner as in a borough council election. In the course of his judgment in the Divisional Court, Goddard J.

C. A.
1938

Counter's Petition, *In re.*
Buckingham *v.* Counter.

rightly said that the older Acts referred to in s. 40 of the Act of 1933, namely the Acts of 1882, 1884, and 1911, constituted a code for municipal election petitions, and that to those Acts a petitioner must go for the method of procedure in bringing a district election petition. He also pointed out that Part IV. of the Act of 1882 was the only part of that Act which was referred to in s. 40 of the Act of 1933. That part of the Act of 1882 includes s. 100 of that Act, which provides for the making of general rules for the regulation of the practice and procedure for municipal election petitions. It was in pursuance of that section that the General Rules of 1883 were made, and no rules replacing or amending these rules have since been made by the Rules Committee of Judges. Rule 38 of these General Rules provides that when the last day for presenting a petition shall happen to fall on a holiday the petition may be put into the letter-box at the Master's office at any time during that day; an affidavit of the time of delivery being subsequently filed. That rule is the provision applicable to the present case. May 17 was here the "last day" of the period of six weeks for presenting the petition. Though that day was a holiday, the petition could have been presented on that day by putting it in the letter-box at the office. The petition is wrong in relying upon s. 295, sub-s. 1, of the Act of 1933. That section does not apply to extend the time for presenting a petition in a district election. It only applies to something required or permitted by or in pursuance of the Act of 1933, and a district election petition is not presented by or in pursuance of that Act, but of the older code of enactments and rules which are not incorporated in the later Act. The fact that the older Acts and rules may be and have been amended by the Rules under the Act of 1933 does not make them a part of that Act. Sect. 295 of the Act of 1933 does not alter the meaning of the expression "last day" as meaning the final day of the prescribed period: it only provides a day subsequent to the last day on which certain things under that Act may be done. In this case the last day for the presentation of the petition was May 17, and as it was not presented on that date it must be dismissed.

GREER L.J. Slesser L.J. will deliver judgment first.

SLESSER L.J. I am of opinion that the judgment of the Divisional Court should be reversed.

The facts of the case are not in dispute. On April 5, 1937, an election of rural district councillors took place for a parish in Devonshire, at which the petitioner was an unsuccessful candidate and the respondent a successful candidate. The petitioner alleged that false statements of fact had been made in relation to her conduct at the election, which amounted to a corrupt and illegal practice within the meaning of the relevant enactments. The petitioner presented a petition against the respondent in respect of the matter, praying that it might be determined that he was not duly elected and that the election was void.

The only question which falls to be considered is whether the petitioner was or was not out of time in presenting her petition. The time within which an election petition of this kind may be presented is now provided for by the Rural District Councillors Election Rules, 1934. Rule 5, sub-r. 5, of these rules, adapting and altering a previous enactment, provides that an election petition complaining of an election on the ground of an illegal practice may be presented at any time within six weeks after the day of election. There is no dispute that in this case the period of "six weeks after the "day of election," stated in that sub-rule to be the period within which a petition may be presented, would in the ordinary course have expired on May 17, 1937, which would then have been the last day on which the petition could have been presented. That day, however, was Whit Monday, a bank holiday, and the petition was in fact presented on the following day, May 18, which was not a holiday of any kind. The question, which is now receiving consideration on appeal, is whether or not that was an adequate presentation of the petition.

The Local Government Act, 1933, s. 295, provides the method by which time under that Act may be computed, as follows: [the Lord Justice read the section]. (1) It is necessary to determine whether that section applies to such a case as the present. In order to ascertain whether it does, the first point to consider is whether the presentation of a petition complaining of the election of a rural district councillor on the ground of an alleged illegal practice is a thing "required "or permitted by or in pursuance of this Act to be done" within the meaning of that section. In my opinion the presentation of such a petition is clearly something required or permitted by or in pursuance of the Act of 1933 to be done. Sect. 40 of the Act of 1933 provides: " (1.) An election "of district councillors shall, subject to the provisions of this "Part of this Act, be conducted in accordance with rules "(in this Part of this Act referred to as 'district election "'rules') made by the Secretary of State, which shall provide " . . . . (2.) At every election regulated by district election "rules the poll shall be taken by ballot, and Part IV. of the "Municipal Corporations Act, 1882, the Municipal Elections "(Corrupt and Illegal Practices) Act, 1884 . . . ., the Municipal Corporations (*sic*) (Corrupt and Illegal Practices) Act, "1911, and the provisions of the Second Schedule to this "Act shall, subject to such adaptations, alterations and "exceptions as may be made by the district election rules, "apply in like manner as in the case of an election of "councillors of a borough."

The Rural District Councillors Election Rules, 1934, were made in pursuance of the Local Government Act, 1933, for the conduct of an election of rural district councillors. This election was regulated by those rules. Rule 5, sub-r. 5, of those rules provides that an election petition complaining of an election on the ground of an illegal practice may be presented at any time within six weeks after the day of election, thus adapting and altering s. 25, sub-s. 1, of the Act of 1884, which had provided a more limited period of time within which such a petition could be presented.

---

(1) See note (1) ante, p. 93.

C. A.
1938

COUNTER'S PETITION, *In re.*
BUCKINGHAM
v.
COUNTER.

Slesser L.J.

Sect. 295, sub-s. 1, of the Local Government Act, 1933, makes a further alteration by providing that where the last day on which anything is required or permitted to be done by or in pursuance of that Act is one of certain specified days the requirement or permission shall be deemed to relate to the first day thereafter, the effect of that sub-section being that when the last day of the six weeks period of time within which the petition may be presented is one of these days that day is excluded and the last day for presenting the petition becomes the next day which is not one of these days.

The earlier Acts are applied by the Act of 1933 to an election of district councillors subject to that Act and to the District Election Rules made under it, and their provisions and language have been adapted and altered by that Act and these rules. Therefore, anything required or permitted to be done by or in pursuance of the Acts of 1882 and 1884 as adapted and altered by the Act of 1933 or the rules made thereunder is clearly something which is required or permitted to be done by or in pursuance of the Act of 1933. In these circumstances it seems to me that the Divisional Court was mistaken in thinking that the time for presenting the petition must be computed only by reference to a code contained in the Acts of 1882 and 1884.

In the present case the presentation of the petition being a thing required or permitted by or in pursuance of the Act of 1933, the period of time within which the petition might be presented being six weeks after the day of election, and the last day of that period, May 17, having been Whit Monday, a bank holiday, it follows that, under s. 295, sub-s. 1, of the Act of 1933, the next day thereafter which was not one of the days specified in that sub-section, namely, Tuesday, May 18, necessarily became the last day for presenting the petition. Accordingly, under the sections and rules to which I have as yet referred, the petition having been presented on May 18, 1937, was not out of time. So far the case presents little difficulty.

Apparently, however, an argument on behalf of the present respondent found favour with the judges of the Divisional

Court, which depended upon the General Rules made in 1883 pursuant to the Municipal Corporations Act, 1882, by the judges on the rota. Sect. 100, sub-s. 1, of that Act provides: "The judges for the time being on the rota for the trial of "parliamentary election petitions, may from time to time "make, revoke, and alter General Rules for the effectual "execution of this Part, and of the intention and object "thereof, and the regulation of the practice, procedure, and "costs of municipal election petitions, and the trial thereof, "and the certifying and reporting thereon." It is clear that the regulation of the practice in election petitions by these rules was not intended to extend to the computation of the time within which to present a petition, and the reason is that by s. 230 of that Act specific provision is made that: "Where . . . . any limited time . . . . is appointed or allowed "for the doing of any act or the taking of any proceeding, then in "the computation of that limited time . . . . the act or "proceeding shall be done or taken at the latest on the last "day of the limited time . . . . unless the last day is a Sunday, "Christmas Day, Good Friday, or Monday or Tuesday in "Easter week, or a day appointed for public fast, humiliation, "or thanksgiving, in which case any act or proceeding shall be "considered as done or taken in due time if it is done or "taken on the next day afterwards, not being one of the "days in this section specified."

The rule here relied upon by the respondent is r. 38 of the General Rules of 1883. That rule provides: " When the last "day for presenting petitions . . . . shall happen to fall on "a holiday, the petition . . . . shall be deemed duly filed if "put into the letter box at the master's office at any time "during such day; but an affidavit, stating with reasonable "precision the time when such delivery was made, shall be "filed on the first day after the expiration of the holidays." No doubt under s. 40, sub-s. 2, of the Local Government Act, 1933, that rule would apply in appropriate circumstances to a petition in respect of a rural district council election, because by that section the legislation there referred to is applicable to every election regulated by the District Election

Rules. That rule, however, has nothing to do with the problem which has to be solved here. The problem here is to compute the period of time within which a rural district council petition may be presented. Here, the period of six weeks after the day of the election expired on Whit Monday, which being one of the days specified in s. 295, sub-s. 1, of the Act of 1933 must therefore be excluded in computing the time within which the petition might be presented, so that the permission to present the petition should be deemed to relate to the first day thereafter not being one of the days specified in that sub-section—namely, to Whit Tuesday, which accordingly becomes the last day of the period. Rule 38 of the Rules of 1883 is dealing with an entirely different subject-matter from that which is here under consideration. It is dealing with the problem what is to be done when the Master's office is closed on the last day for presenting the petition owing to that day being a legal holiday at the Supreme Court. It happened that the Master's office was in fact open on Whit Tuesday, because under Order LXIII., r. 6, of the Rules of the Supreme Court it is only on Monday in Whit week that the office is closed. In this case there was, therefore, no occasion for the application of r. 38 of the Rules of 1883. If, however, it happened that the last day on which something was required or permitted to be done, such as the presenting of a petition, was a day on which the Master's office was closed owing to its being a holiday at the Supreme Court, but was not one of the days specified in s. 295, sub-s. 1, of the Act of 1933, then r. 38 of the Rules of 1883 would apply and the petition would be duly presented by being put into the letter-box at the Master's office at any time during that day, an affidavit being duly filed as required by the rule.

There is no such dichotomy between r. 38 of the Rules of 1883, and s. 295, sub-s. 1, of the Act of 1933, as was thought to exist and to give rise to difficulty when the case was before the Divisional Court.

I will only add, in conclusion, that the distinction between rules for the computation of time and the regulation of practice and procedure is not new. It dates back to the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125). By s. 49 of that Act it is provided: "In reckoning time for the purposes of "this Act, Sunday, Christmas Day, Good Friday, and any day "set apart for a public fast or public thanksgiving shall be "excluded." By s. 25 of that Act powers were given to the judges for the time being on the rota for the trial of election petitions to revoke and alter rules for the effectual execution of the Act and the regulation of the practice, procedure and costs of election petitions and the certifying thereof and reporting thereon.

The decision of the Divisional Court in this case is at variance with the relevant statutes as adopted and modified by the Local Government Act, 1933, and with the former practice.

The appeal should be allowed, as the petition was presented within the time required by the statute.

GREER L.J. I agree with the judgment of Slesser L.J. for the reasons which he has stated. If it had not been that we are differing from two judges sitting as a Divisional Court to whose opinions I attribute the greatest weight, I should not have thought it necessary to add anything to what my brother has said. In my judgment the learned judges of the Divisional Court failed to give due effect to the provisions of s. 295, sub-s. 1, of the Local Government Act, 1933; and also to r. 5, sub-r. 5, of the Rural District Councillors Election Rules, 1934. [The Lord Justice read the sub-section and the sub-rule and continued:] The effect of r. 5, sub-r. 5, of the Rules of 1934 was to provide that s. 25, sub-s. 1, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, which had provided that such a petition as this should be presented within fourteen days, should be adapted and altered so as to provide that the petition may be presented at any time within six weeks after the day of the election. By the provisions of s. 295, sub-s. 1, of the Act of 1933, if the last day of the six weeks should fall on one of the days specified in that section, there would be one day beyond the six weeks,

C. A.
1938

COUNTER'S PETITION, *In re.* BUCKINGHAM. *v.* COUNTER.

Greer L.J.

as the time allowed for presenting the petition. If that additional day happened to be a holiday at the Supreme Court, then the provisions of r. 38 of the General Rules made in 1883 pursuant to the earlier Act of 1882, would take effect, and the directions with regard to placing the petition in the letter-box at the Master's office, and filing the affidavit, would apply. But here, as the last day, namely May 18, was not a holiday of any kind and the Master's office was open on that day, there was no need to apply r. 38.

For these reasons I agree that this appeal should be allowed.

SCOTT L.J. I concur in both the judgments that have been delivered for the reasons there given, and I agree that the appeal should be allowed, the order of the Divisional Court set aside, and the order of Hawke J. restored.

Appeal allowed.
Petition restored.

Solicitors for appellant: *Torr & Co., for Eastley & Co., Paignton, Devon.*

Solicitors for respondent: *Patersons, Snow & Co., for Burd, Pearse & Co., Okehampton.*

J. R.

COMMISSIONERS OF INLAND REVENUE *v.* CULL.

C. A.
1937
Dec. 6, 7, 8.
1938
Jan. 31.

Revenue—Income Tax—Sur-tax—Company—Dividend—Dividend paid "without deduction of income tax"—Whether equivalent to payment "free of tax"—Grossing-up dividend for purpose of sur-tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 39—*Finance Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 28), *s.* 7.

A dividend declared on ordinary shares "without deduction "of income tax" must, having regard to s. 7 of the Finance Act, 1931, be regarded as a dividend consisting of a net sum after deduction of income tax, and therefore, for the purpose of sur-tax, tax is payable by a shareholder in respect of his dividend on an amount arrived at by ascertaining the sum which after deduction of income tax is equal to the dividend received by him. It makes no difference that owing to losses in the preceding year no income tax is payable by the company during the year in question, seeing that the profits and gains out of which the dividend is paid will be subjected to income tax in the following year, and that the gross amount so arrived at is not in excess of the profits or gains available for payment of the ordinary dividend.

So *held* by Sir Wilfrid Greene M.R. and MacKinnon L.J., Lord Romer dissenting.

Neumann v. *Inland Revenue Commissioners* [1934] A. C. 215 distinguished.

Appeal from a decision of Finlay J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on November 18, 1935, Mr. A. E. K. Cull appealed against an assessment to sur-tax for the year ending April 5, 1934, in the sum of 70,637*l.*

Cull & Co. was an unlimited company having a share capital of 800,000*l.* divided into 700,000 preference shares and 100,000 ordinary shares, all issued and fully paid. Mr. Cull was the holder of 20,000 ordinary shares of the company as well as of a large number of preference shares.

At a meeting of the directors (who are called partners in the company's articles of association) held on March 13, 1934, the following resolution was passed: "It was resolved that "the dividends on the 5 per cent. cumulative preference "shares for the four years to March 31, 1934, be paid on

"March 31, 1934, and that an interim dividend for the year "to March 31, 1934, on the ordinary shares of 21*s*. per share "be paid on March 31, 1934, without deduction of income "tax."

In his return of total income for the purpose of assessment to sur-tax for the year ending April 5, 1934, Mr. Cull included the sum of 21,000*l*. as being the dividend received by him on his holding of ordinary shares in the company. In making the assessment under appeal the Special Commissioners added the sum of 7000*l*. as representing income tax in respect of this dividend.

The dividend of 21,000*l*. was not paid over to Mr. Cull in cash, but in respect thereof a sum of 21,000*l*. was credited to his personal account with the company on March 31, 1934.

In the company's profit and loss account for the year to March 31, 1934, a deduction is shown of the sum of 99,114*l*. on account of income tax before arriving at the figure 559,374*l*., which is carried to the balance-sheet as the balance of net profit. It was stated in evidence that owing to previous losses the company was not liable to be charged to income tax for the year ending April 5, 1934, and that the sum of 99,114*l*. was intended to be a reserve for income tax which would become chargeable in respect of the next financial year, which would be assessed on the basis of the company's profits for the year to March 31, 1934.

It was contended on behalf of Mr. Cull: (*a*) that the dividend on the ordinary shares of the company authorized by the resolution of March 13, 1934, was not a "tax free" dividend but a dividend of 21*s*. per share from which the company was entitled but not bound to deduct income tax; (*b*) that the dividend actually received by Mr. Cull was a gross and not a net amount, and consequently the provisions of s. 7, sub-s. 2, of the Finance Act, 1931, were inapplicable; (*c*) that, the company not having deducted income tax from the dividend, no addition on account of income tax ought to be made.

It was contended on behalf of the Crown: (*a*) that the dividend on the ordinary shares of the company authorized by the resolution of March 13, 1934, was a "tax free" dividend, and that the addition of income tax to the amount actually received by Mr. Cull had been correctly made; (*b*) alternatively, that the dividend actually received by Mr. Cull had been paid out of a fund of income diminished by a reserve for income tax, and that the appropriate addition for income tax had been correctly made in accordance with s. 7, sub-s. 2, of the Finance Act, 1931.

The Commissioners who heard the appeal, gave their judgment in the following terms: "A shareholder can have "no claim or title to any part of a company's profits unless "and until the company has duly authorised the distribution "of a dividend, and the terms of the authorisation determine "the amount which the shareholder can claim. On payment "of a dividend a company is authorised but not compelled to "deduct income tax. In the case of a 'tax free' dividend "for the purpose of sur-tax the amount to be added to the "dividend actually received by a shareholder is an amount "representing income tax which has been deducted by the "company from the dividend leaving the amount specified in "the resolution (see *Gold Fields American Development Co.* v. "*Consolidated Gold Fields of South Africa, Ld.* (1)). In the case "before us it is contended on behalf of the Crown that in the "resolution of March 13, 1934, the words 'without deduction "'of income tax' should be read as 'after deduction of income "'tax' and that the dividend is a 'tax free' dividend. In "our opinion the words 'without deduction of income tax' "qualify the words 'be paid' and mean that no deduction "on account of income tax is to be made on payment of the "dividend of 21*s.* per share. Accordingly we hold that the "dividend is not a 'tax free' dividend, that no income tax "has been deducted by the company, and that no addition "to the dividend should be made on account of income tax. "We therefore reduce the assessment by the sum of 7000*l.*"

Finlay J. said he had arrived at a different conclusion. He had had the advantage of Lawrence J.'s decisions in *Inland Revenue Commissioners* v. *Pearson* (2) and *Inland*

---

(1) [1926] Ch. 338, 356.

(2) [1936] 2 K. B. 533.

Revenue Commissioners v. *Pratt.* (1) A company was liable to pay tax on all its profits, and what particular year or particular periods were taken seemed immaterial. The company did not pay income tax as agents for the shareholders, but by paying tax acquired a right to deduct, in paying dividends, a proportionate part of the tax from each dividend paid. It was not bound to deduct the tax, but if it chose not to exercise its right, it was simply paying an additional dividend to the shareholder. That was determined by the *Ashton Gas Co.* case. (2) The difficulty here was caused by the decision of the House of Lords on a minor point in *Neumann* v. *Inland Revenue Commissioners.* (3) That difficulty was, however, solved by Lawrence J.'s decisions in the two cases already referred to. The ground on which he there distinguished *Neumann's* case (3) applied here. It was sought here to distinguish Lawrence J.'s decision on the ground that here (apart from certain dividends) there were no taxable profits for the year in which the payment was made. He did not think that made any difference. He was unable to distinguish between the words " without deduction of tax " and the words " free of tax " and the principle of the matter was that the company was giving to the shareholder not only the dividend of 21s. per share but in addition a thing which could be measured by money—namely, the immunity from tax. On these grounds the appeal from the Commissioners succeeded.

Mr. Cull appealed. The appeal was heard on December 6, 7 and 8, 1937, and judgment given on January 31, 1938.

J. M. Tucker K.C. and *Terence Donovan* for the appellant. Rule 20 of the All Schedules Rules to the Income Tax Act, 1918, provided that a company's profits or gains should be computed for purposes of income tax on the full amount of the same before any dividend was paid and that the company in paying a dividend " shall be entitled to deduct the tax "appropriate thereto." This rule therefore gives the company an option to deduct income tax at the date of the payment of a dividend. That rule was amended by s. 39 of the Finance Act, 1927, and dealt with the difficulty caused by differences in the rate of tax. Then s. 7 of the Finance Act, 1931, enabled tax to be deducted on payment of a dividend at the full current rate, although the profits or gains of the company liable to tax in the year when the dividend was paid were less than the dividend paid. A company is not, however, bound to deduct tax, and it has not done so here, as is shown by the words "without deduction of tax"; s. 7, sub-s. 2, therefore has no application. This is not the same as paying a dividend "free of tax," which only means that the tax has been deducted before arriving at the rate of dividend payable. Further *Neumann* v. *Inland Revenue Commissioners* (1) makes it clear that a company cannot deduct a tax in regard to a dividend paid out of moneys on which it has itself paid no tax. That was the position here, and the point is not affected by s. 7, sub-s. 2, of the Finance Act, 1931. It is a case where no deduction has been made of tax for the very good reason that none has been paid. *Inland Revenue Commissioners* v. *Pearson* (2) is a different case, for there the dividend was paid out of accumulated profits of the company which had borne tax. Lawrence J. held in these circumstances that there had been a deduction of tax although payment was there said to have been made without the exercise of the company's right to deduct tax. In the present case the company did not pay any tax to the Revenue in respect of the profits out of which it paid the dividend in question. *Gold Fields American Development Co.* v. *Consolidated Gold Fields of South Africa, Ld.* (3), in which *Attorney-General* v. *Ashton Gas Co.* (4) was relied on, is of no assistance in the present case. It merely explains the effect of a dividend paid "free of tax." *Neumann* v. *Inland Revenue Commissioners* (1) decided that *Gimson* v. *Inland Revenue Commissioners* (5) was rightly decided. That was a case where the dividend was made up from capital moneys and from profits not liable to tax. There is here no ground for treating Mr. Cull as having received 7000*l.* in addition to the 21,000*l.* he actually received. It is not a case where the dividend can properly be grossed-up for super-tax purposes.

---

(1) [1936] 2 K. B. 533.
(2) [1906] A. C. 10.
(3) [1934] A. C. 215.

---

(1) [1934] A. C. 215.
(2) [1936] 2 K. B. 533.
(3) [1926] Ch. 338.
(4) [1904] 2 Ch. 621; and in H. L. [1906] A. C. 10.
(5) [1930] 2 K. B. 246.

Sir Donald Somervell A.-G. and *R. P. Hills* (*J. H. Stamp* with them) for the Crown. When a shareholder receives a dividend he never has to pay income tax on the amount received. It is a receipt of a different character from any ordinary receipt which is charged to tax: *Attorney-General* v. *Ashton Gas Co.* (1) Income tax is paid on the profits and gains of a company, but no deduction is permissible before fixing the dividend. It is in paying it that the appropriate income tax is deducted. By reason of this deduction a shareholder always receives notionally more than the amount paid to him: *Attorney-General* v. *Ashton Gas Co.* (1); *Hartland* v. *Diggines.* (2) For the appellant it is contended that the company is not bound to make the deduction and only has power to do so, and that by declaring a dividend "without "deduction of income tax" the company has abandoned the right to deduct, so that the dividend paid is a gross sum and not a net sum after deduction of tax. This argument fails, because the words "without deduction of income tax" have the same meaning as "free of income tax," and a dividend paid "free of tax" is a net dividend which for purpose of sur-tax must be grossed-up: *Gold Fields American Development Co.* v. *Consolidated Gold Fields of South Africa, Ld.* (3) See also *Inland Revenue Commissioners* v. *Pratt* (4), a case heard with *Inland Revenue Commissioners* v. *Pearson.* (4)

Rule 20 of the All Schedules Rules, like s. 54 of the Income Tax Act, 1842, which it replaces, contemplates a distribution in some quantifiable form, and then provides that having quantified it the company is entitled to deduct tax. But whether payment is made of a sum from which tax is deducted in the course of payment or of a sum free of tax in the sense that before payment the tax has already been deducted from a larger sum, the effect is the same.

---

(1) [1904] 2 Ch. 621; and in H. L. [1906] A. C. 10.

(2) [1926] A. C. 289.

(3) [1926] 1 Ch. 338, 356.

(4) [1936] 2 K. B. 533.

[ROMER L.J. Is it possible to distribute without deduction of tax?]

In the normal case only if the dividend is paid tax free. The cash received by a shareholder in respect of a dividend is a sum arrived at after deduction of tax, and the tax deducted has no relation to the figure of tax payable by the company on its profits or gains: see per Lord Tomlin in *Neumann* v. *Inland Revenue Commissioners.* (1) It may well be that in earlier days a greater correspondence was anticipated between the tax deducted from the shareholders and that paid by the company, but it soon became apparent that they rarely corresponded exactly. Sect. 7, sub-s. 1, of the Finance Act, 1931, laid down what had previously been the practice, which was upheld by the Court of Appeal in *Hamilton* v. *Inland Revenue Commissioners* (2); *Gimson* v. *Inland Revenue Commissioners* (3) is an exceptional case, as items were in question which were never subject to tax: see *Neumann* v. *Inland Revenue Commissioners.* (4) The facts here are different from those in *Gimson's* case (3), because it cannot be said that the company's profits and gains which are involved will never be assessable to income tax. *Neumann's* case (4) accords with the view that the deduction made on payment of a dividend is made as part of a system for imposing the proper liability for income tax on the shareholder. The only difficulty in that case arises on the second point, which was raised on the Crown's cross-appeal, and relates to the segregated part of the profits of a company left after sufficient profits had been distributed in dividends for the deduction of tax to be equal in amount to the tax borne by the company under the Sch. A assessment, to which alone it was subject. The result of grossing-up the segregated amount would, when the sum so reached was added to the other gross profits, have provided a sum in excess of the total gross profits of the company; and that is regarded by Lord

---

(1) [1934] A. C. 215, 226.
(2) [1931] 2 K. B. 495.
(3) [1930] 2 K. B. 246.
(4) [1934] A. C. 215, 238.

Tomlin as affording a ground for saying that it would be repellent to treat the segregated portion as having had tax deducted. It is difficult to reconcile this view with that expressed earlier—namely, that the tax deducted on payment of dividends had no direct relation to the tax paid by the company on its profits or gains. In any case that consideration does not arise here, and the decision there was based on such special facts that it should not be applied to any other facts.

[Sir Wilfrid Greene M.R. Does it not follow from r. 20 that in the case of a company subject only to tax under Sch. A the tax deducted from the dividend cannot exceed it?]

In deducting tax under r. 20 a company does not make the deduction in reference to the tax it has itself borne. A difficulty arose as to the meaning of "appropriate thereto" in r. 20, but it is removed by s. 39 of the Finance Act, 1927. It had always been the practice to gross-up a dividend without reference to the rate of tax paid by the company, but that practice was criticized, and therefore s. 39 was passed. It may be that when r. 20 was enacted it departed somewhat from the corresponding section of the Act of 1842. The Crown's contention is that the Legislature intended dividends to be taxed in the hands of shareholders by reference to the sum they receive. Whatever form of resolution is adopted by a company in paying a dividend, the sum received by the shareholders is a sum in respect of which income tax has been deducted, so that it falls to be grossed-up under s. 7, sub-s. 2, of the Finance Act, 1931.

[They also referred to *In re Sharp*. (1)]

Terence Donovan replied.

Cur. adv. vult.

1938. Jan. 31. Sir Wilfrid Greene M.R. The appellant is the holder of 20,000 ordinary shares in Cull & Co., an unlimited company incorporated under the Companies Acts. On March 13, 1934, the directors of the company declared an interim dividend on its ordinary shares for the year ending March 31, 1934, of

---

(1) [1906] 1 Ch. 793.

21s. per share "without deduction of income tax." The appellant was assessed to sur-tax for the year ending April 5, 1934, and for the purpose of the assessment the Special Commissioners added to the amount of the ordinary dividend which had been credited to him, namely 21,000*l.*, a sum of 7000*l.* as representing income tax in respect of the dividend. The addition of income tax to a net dividend for the purpose of sur-tax assessment is commonly referred to as "grossing-up" the dividend, and in this judgment I will use this convenient though ill-sounding expression. The appellant appealed against the assessment upon the ground that as the dividend had been declared "without deduction of income tax" it was not legitimate to gross it up, that process being (in his contention) only permissible in cases where income tax is deducted from the dividend. The Special Commissioners allowed his appeal, but their decision was reversed by Finlay J., from whose judgment the present appeal is brought.

Before I proceed to consider the question raised by the appeal, certain facts must be stated with regard to the company's accounts. The company's profit and loss account for the year ending March 31, 1934, showed a net profit of 559,374*l.* 2*s.* 1*d.* In the years immediately preceding it had traded at a loss, the accumulated losses being 239,188*l.* 3*s.* 2*d.*, and as the result of this position the company was not liable to be charged to income tax under Sch. D for the year ending April 5, 1934. The balance standing to the credit of profit and loss account as at March 31, 1934, after deducting these accumulated losses was 320,185*l.* 3*s.* 2*d.*, of which 20,000*l.* was transferred to reserve, 105,000*l.* was utilized in paying four years' preference dividends on the preference shares of the company, while the ordinary dividend exhausted a further 105,000*l.*, leaving 90,185*l.* 18*s.* 11*d.* to be carried forward. Before arriving at the profit and loss figure of 559,374*l.* 2*s.* 1*d.*, provision was made for income tax in the sum of 99,114*l.* 9*s.* 7*d.* This sum was intended to form a reserve against income tax which would become chargeable in respect of the next financial year. The making of this provision was not a deduction of income tax from the dividend declared, and for

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
CULL.

Sir Wilfrid Greene M.R.

present purposes it may, upon my view of the case, be disregarded. Equally irrelevant is the fact that during the year in question the company received dividends on investments from which tax was deducted at the source.

The only fact of importance which emerges from the accounts is that the company had ample funds to enable it, if it had so desired, to declare a dividend of 21*s.* per share on its ordinary shares "tax free." If the declaration had taken this form it would admittedly have been equivalent to the declaration of a dividend of such an amount as after deduction of income tax would have produced a net dividend of 21*s.*, payment of 21*s.* would have been a payment after deduction of tax, and it would have been necessary for sur-tax purposes to gross-up the 21*s.* by adding to it the amount of the tax so deducted: see *Gold Fields American Development Co.* v. *Consolidated Gold Fields of South Africa, Ld.* (1)

The question which arises on this appeal is whether or not upon the true construction of the relevant statutory provisions and in the circumstances of the case the declaration and payment of the dividend were in law equivalent to the declaration and payment of a dividend of 21*s.* "tax free" notwithstanding that upon its face the declaration purported to be a declaration of a dividend of 21*s.* "without deduction "of tax." The contention of the appellant can be concisely stated. It is that a company is entitled to deduct or not to deduct tax at its option; that the question which alternative it has chosen is to be decided by reference to the action of the company itself; that in the present case the declaration upon its true construction demonstrates that the company has elected not to deduct tax; and that under the relevant statutory provisions a dividend may only be grossed up for sur-tax purposes where the company has in fact deducted tax. In support of this conclusion it is said that, whereas when the company deducts tax the share of profits which the shareholder receives is for tax purposes a previously existing gross sum of which the Crown is to be treated as having received a part, when no tax is deducted the shareholder cannot be

(1) [1926] Ch. 338, 356.

treated as having received a gross sum, since no such gross sum ever existed or can be treated as having existed.

The application of the provisions of the Income Tax Acts relating to dividends paid by incorporated companies is a subject which bristles with difficulties. They originate in s. 54 of the Income Tax Act, 1842. At the date when that Act was passed there was some excuse for the apparent simplicity of the section; but with the growth of limited companies difficulty after difficulty appeared. The section contemplated a very simple procedure. The tax was charged on the " body of persons " who in due course would divide up the balance of its profits which remained after payment of the tax. Upon such division the persons entitled to share in the profits were to be bound to allow out of the dividend "a proportionate deduction in respect of the duty so charged." But the section applied to all bodies of persons whether incorporated or unincorporated. In the case of unincorporated bodies no particular difficulty appears to have presented itself. This was far from being the case with incorporated bodies. In its application to these latter bodies the section could only work if some method could be found of reconciling two fundamentally different conceptions—namely, that of a body of persons paying a share of profits to the persons entitled to those profits as such and that of an incorporated body of persons paying dividends to its members who have no right to the profits as such at all. A dividend paid by a limited company to its members is in its nature quite different from a share of profits. This fact arises from the very circumstance of incorporation. But the section treats that circumstance as irrelevant and provides no method of resolving the fundamental antinomy. The fact that dividends are often paid in whole or in part out of profits of past years, changes in the rate of tax, the operation of the statutory provisions for measuring profits by reference to the results of previous years, raised questions which have puzzled the Revenue, the companies concerned, and the Courts. The Legislature, instead of starting afresh with a logical system, has contented itself with patchwork designed to deal with

Sir Wilfrid Greene M.R.

particular difficulties as they emerged. Thus s. 39 of the Finance Act, 1927, dealt with the difficulty caused by differences in the rate of tax. Sect. 7 of the Finance Act, 1931, dealt with the difficulty caused by the fact that dividends may be paid out of the profits of a year in which the profits as assessed to tax are nil or less than the actual profits divided. There is also a strong body of opinion in favour of the view that the law was altered in 1918 when r. 20 of the General Rules was substituted for s. 54 of the Act of 1842: see per Lord Tomlin in *Neumann* v. *Inland Revenue Commissioners* (1); *Gold Fields American Development Co.* v. *Consolidated Gold Fields of South Africa, Ld.* (2); *Hamilton* v. *Inland Revenue Commissioners* (3), per Lord Hanworth M.R. (4) and per Lawrence L.J. (5)

The resulting scheme of legislation might appear to have succeeded in providing a practical solution of the fundamental antinomy to which I have referred. A company pays tax on its profits measured by the rules for the time being in force. It pays a dividend out of its profits. In making the payment it is entitled to deduct tax at the standard rate current at the time irrespective of the rate of tax prevailing when the profits were made and irrespective of the fact that for the year in which the dividend is paid the profits as assessed to tax may be nil or less than the actual profits of the year used for payment of the dividend. The shareholder for all purposes of his return of total income is treated as having received a dividend equal to the net amount plus the tax deducted, that is, his dividend is grossed-up by adding back the tax.

This scheme is sufficiently well adapted to work in the ordinary case where dividends are paid less tax or "tax free." And it might have been thought that all troubles were at an end. This was not so, for a problem of great difficulty arose almost at once in *Neumann* v. *Inland Revenue Commissioners*. (6)

(1) [1934] A. C. 215, 225; 18 Tax Cas. 332, 360.
(2) [1926] Ch. 338, 347.
(3) [1931] 2 K. B. 495; 16 Tax Cas. 212.
(4) 16 Tax Cas. 228.
(5) Ibid. 233.
(6) [1934] A. C. 215.

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
CULL.

Sir Wilfrid Greene M.R.

It is upon the decision in that case that the argument of the appellant is based. For it is said on his behalf that *Neumann's* case (1) laid down a general rule to the effect that the provisions as to grossing-up contained in sub-s. 2 of s. 7 of the Finance Act, 1931, only apply when tax is in fact deducted by the company; and that as in the present case no tax was deducted there can be no grossing-up. The decision in *Neumann's* case (1) must accordingly be examined with care. But in order to make any such examination intelligible it is necessary to have in mind the language of r. 20 of the General Rules and s. 7 of the Finance Act, 1931, which I accordingly quote: Rule 20: "The profits or gains to be "charged on any body of persons shall be computed in "accordance with the provisions of this Act on the full amount "of the same before any dividend thereof is made in respect "of any share, right or title thereto, and the body of persons "paying such dividend shall be entitled to deduct the tax "appropriate thereto." Finance Act, 1931, s. 7, sub-s. 1: "The provisions of Rule 20 of the General Rules, which "authorize the deduction of the appropriate tax from any "dividend paid by a body of persons, shall, in relation to a "dividend paid by any body of persons, whether before or "after the commencement of this Act, be construed as "authorizing the deduction of tax from the full amount paid "out of profits and gains of the said body which have been "charged to tax or which, under the provisions of the Income "Tax Acts, would fall to be included in computing the "liability of the said body to assessment to tax for any year "if the said provisions required the computation to be made "by reference to the profits and gains of that year and not "by reference to those of any other year or period." Sub-s. 2: "Subject as hereinafter provided, a dividend paid by a body "of persons, whether before or after the commencement of "this Act, shall, to the extent to which it is paid out of such "profits and gains as are mentioned in subsection (1.) of this "section, be deemed, for all the purposes of the Income Tax "Acts, to represent income of such an amount as would, after

---

(1) [1934] A. C. 215.

"such deduction of tax as is authorized by the provisions "of the said Rule 20, be equal to the net amount received: "Provided that the provisions of this subsection shall not "apply to a preference dividend to which section twelve of "the Finance Act, 1930, applies, and shall have effect subject "to the provisions of subsection (3.) of that section."

Now in order to understand *Neumann's* case (1) it must be remembered that the question which it raised flowed directly from the decision in *Fry* v. *Salisbury House Estate, Ld.* (2) The company made profits out of the rents received from tenants largely in excess of the Sch. A assessment. The Crown in the *Salisbury House* case (2) claimed that these excess profits were assessable, but the claim was negatived by the Courts upon the simple and, one would have thought, obvious ground that the Sch. A assessment covered all the profits derived from ownership of land, and the fact that the actual profits might exceed or fall below the figure of the assessment was immaterial.

If the property in question in that case had belonged to an individual, no difficulty would have arisen with regard to his sur-tax assessment. He would have included in his return of total income the amount of the Sch. A assessment and nothing more. But as the owner was a limited company the old difficulty once again raised its head. The company distributed two dividends. Upon the first of these an amount equal to the Sch. A assessment was distributed under deduction of tax. The second distribution was made out of a sum set aside in the accounts to represent surplus rents in excess of the Sch. A assessment. Upon this distribution no tax was deducted. The Crown claimed to be entitled to have the amount of the second dividend grossed-up. The taxpayer claimed that he was not liable to be assessed to sur-tax at all in respect of the second dividend. Neither claim succeeded. It is with the decision on the Crown's claim that we are primarily concerned. With regard to the decision upon the taxpayer's claim, it is only necessary to point out in passing that the result necessarily flowed from the antinomy to which

(1) [1934] A. C. 215.

(2) [1930] A. C. 432.

I have referred and the patchwork provisions enacted by the Legislature in order to remove the more glaring difficulties to which it led. In the result a fund of profits which if received by an individual would have been measured and franked for all tax purposes by the Sch. A assessment, when passed through the company and used to pay a dividend to its shareholders attracted sur-tax in their hands. The Legislature had apparently failed to remember and make provision for the special nature and effects of Sch. A in the case of land-owning companies. In consequence the shareholder in such a company is subject to a burden which individual landowners are not called upon to bear.

But upon the question of grossing-up, the House of Lords was able so to construe sub-s. 2 of s. 7 as to avoid a result which in the words of Lord Tomlin would have been "repellent "to most minds." The effect of grossing-up the second dividend would have been to treat the company as having had a larger sum to distribute than it in fact had and the shareholder as having received, in the shape of cash and tax, a sum greater than he did so receive. In paying the second dividend the company exhausted the excess rents, and to have treated the dividends paid as representing a larger gross sum from which tax had been deducted would have been to fly in the face of the facts. There never was in fact a deduction; there could not have been a deduction once it was decided to distribute the whole of the excess rents in cash among the shareholders.

I apprehend that the same result would have followed if the company had distributed in one dividend the whole of its profits from rents which remained in its hands after payment of the Sch. A tax. In that event it would have distributed a "net" amount, for it would have "deducted" tax—namely, an amount equal to the Sch. A tax which it had itself borne. But to have grossed-up the dividend actually received by adding back a larger sum for tax would again have involved the false assumption that the fund available for distribution was greater than it in fact was. Some of the expressions used in the opinions delivered do

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
CULL.

Sir Wilfrid Greene M.R.

not perhaps fit such a case. But I cannot bring myself to believe that the result would have been different. If the language of General Rule 20 were the same as that of s. 54 of the Act of 1842 the solution of these problems would have been simpler. For the deduction of the Sch. A tax from the dividends would have been "a proportionate deduction in "respect of the duty so charged." It is open for the consideration of the House of Lords whether the difference in language has the result which it is said to have in the authorities to which I have referred in an earlier part of this judgment.

The manner in which the actual problem in *Neumann's* case (1) was solved can best be seen by quoting the actual words of the opinions delivered by the House. Lord Tomlin said (2): "The question, however, remains as to the figure "at which it is to be brought in. Now I think it would be "repellent to most minds that the appellant should be charged "as a part of his income with a sum which not only has never "come to him but has never existed in fact. It is plain that "the respondents' cross-appeal, which seeks to treat the "sum of 4275*l.* as a net sum, corresponding to a gross sum "of 5343*l.* 15*s.*, assumes that the amount divisible by the "Company was something in excess of anything they ever had "to divide. It is said, however, that s. 7, sub-s. 2, of the "Finance Act, 1931, compels the conclusion that the sum of "5343*l.* 15*s.* is the correct figure to be brought into computa-"tion. I do not think that the effect of the statutory provision "is as contended for by the respondents. The sub-section in "effect provides that it is the gross amount before deduction "which is to be treated as the income for the purposes of the "Acts. If a deduction from the gross sum was authorized "but was not in fact made, as was the case here, there is in "my opinion nothing in the language of the sub-section which "entitles the Inland Revenue to treat the gross sum as being "greater than in fact it was. From the income tax point "of view it makes no difference to the Revenue whether the "deduction is made or not because the Company does not "have to account for what it deducts."

(1) [1934] A. C. 215.
(2) Ibid. 230.

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
CULL.

Sir Wilfrid Greene M.R.

Lord Warrington of Clyffe said (1): "This brings me to "the second question namely, at what figure is the dividend "to be brought in? Here again I agree with my noble and "learned friend. In such a case as this, namely where no "deduction is in fact made, there is no distinction between a "gross sum and a net sum. The actual sum paid, and not "some wholly fictitious sum, is therefore that which should "be included in the return of income."

Lord Wright said (2): "But the present case has proceeded "on the basis of a specially segregated fund, the whole of "which was distributed without any deduction for tax; nor "was the dividend in fact, nor could it be, described as "'tax free,' a phrase which is used to indicate that the "dividend is net and under prior deduction of tax. Such a "case as the present is unusual because a fund has been "segregated and divided in toto; hence if the Company had "deducted tax it would have been from a gross amount, not "of 5343*l.* 15*s.*, but of 4275*l.*, and equally if the dividend "had been 'tax free' it would have been a dividend of the net "amount after the appropriate deduction of tax had been "made from the sum of 4275*l.* Furthermore, in the Company's "hands, no greater sum in respect of this fund was chargeable "to income tax than 18,325*l.*, of which 4275*l.* was the "appellant's aliquot proportion. What was distributed, being "4275*l.*, was in my judgment the gross amount; the Company, "though authorized to deduct tax from it, were not bound "to deduct it and did not in fact do so. I cannot see any "justification for describing the sum distributed as a 'net "'amount' and hence I conclude that s. 7, sub-s. 2, does "not apply. I cannot treat the word 'net' as mere surplusage "or as simply meaning the actual amount, whether gross "or net."

It is not surprising that the language used in these passages should have led to the argument that in no case where tax is not in fact deducted on payment of a dividend can there be a grossing-up under s. 7, sub-s. 2, for the expressions used are general in character. But so to construe them

(1) [1934] A. C. 233.

(2) Ibid. 242.

C. A.
1938

Inland Revenue Commissioners v. Cull.

Sir Wilfrid Greene M.R.

would lead to very far-reaching results which the Legislature can scarcely have intended. For every company by stating in its dividend declaration that no tax is to be deducted could free its shareholders from a substantial liability to sur-tax which they would have incurred if precisely the same amount of cash had been paid to them under a declaration of dividend "tax free." If that is the effect of the decision in *Neumann's* case (1) it must be loyally followed. But I cannot bring myself to think that the members of the House of Lords intended by the language which they used in a very special case to produce such sweeping consequences.

There is in my opinion a fundamental difference between the facts in *Neumann's* case (1) and those in the present case—namely, that in the present case the fund of profits available for distribution was more than sufficient to provide a sum equal to the cash actually distributed plus the tax thereon ; that is, the company could have declared a dividend of 21s. per share " tax free " without in any way departing from the realities of the case. As has already been pointed out, this could not have been done in *Neumann's* case (1), since to have done so would have involved the assumption that the company had made more gross profits than it in fact had made. It is in reference to this essential fact that the language in *Neumann's* case (1) was used. It was this fact that made it impossible to describe the amount received by the shareholder in that case as a " net "amount."

But it is said that it is equally impossible to describe as a " net amount " the amount received by the appellant in the present case since no tax was deducted, and it is only when tax is deducted that the amount received by the shareholder can properly be described as a " net amount." The argument is an attractive one, and I feel its force. But it appears to me to depend upon an assumption as to the meaning of the word " deduct," the correctness of which I will endeavour to examine. That assumption is that in order that there may be a deduction there must be in terms or by

(1) [1934] A. C. 215.

conduct an exercise by the company of the right to deduct which is said to be given to it by General Rule 20.

The word "deduct" in r. 20 does not mean that some specific sum is to be taken away and set apart, any more than does the same word in General Rule 19. When the latter rule says that the person paying yearly interest shall be "entitled . . . . to deduct and retain thereout a sum "representing the amount of the tax thereon," it merely means that the payment of the net sum is to be a good discharge as between payer and payee. The language used in r. 20 is similar to that used in r. 19. If a company declares a dividend at the rate of 5*l.* per cent. on its ordinary capital it obtains a good discharge from the shareholder in respect of the debt so created if it pays 5*l.* less tax. There is no need to refer to tax in the declaration—indeed this is never done in practice save where the dividend is declared "tax free," which is nothing more than a convenient formula for declaring a larger gross dividend. The right to deduct, therefore, does not arise by virtue of something in the declaration—it comes into effect on payment, and the shareholder cannot complain of its exercise. If a shareholder "refuses to allow" the deduction (whatever that may mean), he, like the recipient of interest under r. 19 who makes a similar refusal, is liable to a penalty under General Rule 23, sub-r. 1.

In the case of an unincorporated body of persons "making "a dividend of" its profits (to use the language of s. 54 of the Act of 1842 and r. 20), s. 54 compelled the persons entitled to the profits to "allow out of" their dividends "a proportionate deduction in respect of the duty so charged" in respect of the profits of the body of persons. Accordingly, if such a body made 1000*l.* profits and paid tax at 1*s.* in the £ thereon and then proceeded to divide the balance among the persons entitled, they necessarily performed the operation of deduction by distributing the net sum. No declaration to that effect was needed—the mere payment of the net sum in cash was payment under deduction of tax.

In my opinion the essential character of the act of "deduction" has remained the same notwithstanding the fact that under the law as it at present stands the tax "deducted" from the dividend is not necessarily comparable with the tax paid or to be paid by the company in respect of the profits out of which the dividend is paid. It is indeed this latter circumstance which appears to give to the word "deduction" a concrete meaning which requires some specific act of deduction to be done. This appearance is accentuated by the provisions of s. 33, sub-s. 1, of the Finance Act, 1924, which requires a company to show the gross and net amounts on the counterfoil of the dividend warrant, although I do not think that there is anything in that sub-section which is inconsistent with the view which I have expressed as to the meaning of deduction.

Now if a company having a fund of profits in respect of which it has paid tax declares a dividend at a rate which exhausts the balance remaining after payment of the tax and then proceeds to pay the dividend at the actual rate declared, it has "made a dividend" of its net profits, and in doing so has (as it appears to me) of necessity "deducted" tax, at any rate where there is no difference in the rate of tax. Similarly, if the dividend does not exhaust the balance the company will in my opinion have merely paid a "tax free" dividend. In each case the dividend would have to be accompanied by the statement required by s. 33, sub-s. 1, of the Act of 1924 and would have to be grossed-up for sur-tax purposes under s. 7, sub-s. 2, of the Act of 1931. The amount received by the shareholder would, in my opinion, be a "net amount" within the meaning of both provisions. For it has been paid out of the net balance of a fund of profits which has borne tax, and the aggregate of the dividends actually paid is in fact less than the gross fund before tax was paid out of it by at least the amount of tax paid in respect of those profits.

The next case to be considered is where the tax falls to be deducted from the dividend at a rate higher than that in force when the profits out of which the dividend is paid were made. An example will make the point clear. Suppose a company makes 1000*l.* profit on which it pays tax at 4*s.* in the £, leaving 800*l*. In a subsequent year when the rate of tax is 5*s*. in the £ it declares a dividend at a rate which will exhaust 600*l*. and then proceeds to distribute the whole of the 600*l*. without deducting any sum in respect of tax. It appears to me that in such a case it has in law paid a tax free dividend and that no language in the declaration can alter this fact. For the 600*l*. plus tax (which at 5*s*. would amount to 200*l*.) would be no more than the actual net fund available for distribution, and it would not be possible to say, as was said in *Neumann's* case (1), that the operation of grossing-up would involve assuming the existence of a sum which never in fact existed. In other words, the amount received by the taxpayer would be of necessity a net sum, and no express or implied intention to deduct would be required to make it such; nor could any declaration of intention not to "deduct" make it anything other than a net sum.

In a case falling under the second alternative in sub-s. 1 of s. 7 of the Act of 1931 the position is more complicated, since that alternative deals with the case where dividends are paid (as in the present instance) out of profits which will only come into computation in a year subsequent to that in which the dividend is paid. In such a case the profits have not borne tax and there is nothing in law to prevent the company distributing the whole of them without deduction. I must confess that the case of such a distribution presents a difficulty, and it may be that it would be impossible to treat the dividend as a "net" dividend within the meaning of sub-s. 2. But that is not this case. Here the dividend declared and paid plus an amount equal to tax at the standard rate amounted to far less than the actual profits, and I see no difficulty in regarding the amount received by the shareholder as a net amount.

I have endeavoured to the best of my ability to construe the relevant provisions in the light of the decision in *Neumann's* case (1) and to confine that decision to the sole point which in my judgment it was intended to cover. If my reasoning is unsatisfactory my excuse must be that the whole

(1) [1934] A. C. 215.

system of deduction of tax from dividends is illogical from top to bottom, and any attempt to make it logical is necessarily open to criticism.

It only remains to say a word in reference to the cases of *Inland Revenue Commissioners* v. *Pearson* and *Inland Revenue Commissioners* v. *Pratt* (1), which were relied upon by Finlay J. in his judgment in this case. In those cases dividends were paid out of accumulated profits, and the amount paid was the actual amount declared. The shareholders claimed that the sums received were gross amounts and ought not to be grossed-up for sur-tax purposes. The Special Commissioners took this view, but their decision was reversed by Lawrence J. In my opinion those cases were correctly decided, although I am not sure that I quite agree with the whole of Lawrence J.'s reasoning. In the main, however, I do not think that his view differs from my own. The appeal must be dismissed with costs.

LORD ROMER. (2) I regret to find myself in disagreement with the other members of the Court.

In this case the Court has once more to consider the relative positions under the Income Tax Acts of a shareholder and his company in respect of the dividends that are paid to him from time to time.

Before the decision of the House of Lords in *Neumann's* case (3) there were some people, and I fear that I was one of them, who erroneously thought that the position of the shareholder was analogous to that of a debenture holder of the company in relation to the debenture interest. Being a legal entity entirely distinct from the entity of the company, it was thought that in reference to the dividends he was one taxpayer and that, in reference to the profits of the company out of which the dividend was paid, the company was another and distinct taxpayer. If this had been the correct view, the shareholder would have been directly assessable to tax in respect of his dividends where the profits out of which they were paid were not brought into charge, the company only being entitled (although not bound) under r. 20 of the General Rules applicable to All Schedules to deduct the tax from the dividends when the latter were payable out of profits that had been brought into charge. In this respect only he would have differed from the debenture holder, the company being (under r. 21) bound to deduct the tax from his interest when payable out of profits not brought into charge.

---

(1) [1936] 2 K. B. 533.
(2) His judgment was read by Sir Wilfrid Greene M.R.
(3) [1934] A. C. 215.

It was, however, held in *Neumann's* case (1) that this is far from being the true position of the shareholder in relation to a dividend of a trading company. It was there held that the shareholder is never assessable in respect of the dividend, and that his true position is that which it had been stated to be by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ld.* (2) There, in reference to a company paying a dividend to its shareholders, he said this: "If the principle of its "being a distinct person, distinct from its shareholders . . . . "had been carried to a logical conclusion, there would have "been no reason why each shareholder should not, in his "turn, have to return as part of his profits or gains under "Schedule D, the money received by him in dividends. "Their taxation would seem to be logical, but it would be "destructive of joint stock company enterprise, so the Act "of 1842 has, apparently, proceeded on the idea that for "revenue purposes a joint stock company should be treated "as a large partnership, so that the payment of income tax "by a company would discharge the quasi-partners. The "reason for their discharge may be the avoidance of double "taxation, or to speak accurately, the avoidance of increased "taxation. But the law is not founded upon the introduction "of some equitable principle as modifying the statute; it is "founded upon the provisions of the statute itself; and the "statute carries the analogy of a partnership further, for it "contemplates a company declaring a dividend on the gross "gains, and then on the face of the dividend warrant making "a proportionate deduction in respect of the duty, so that

---

(1) [1934] A. C. 215.

(2) [1923] A. C. 744, 769.

C. A.
1938

Inland Revenue Commissioners v. Cull.

Lord Romer.

"the shareholder whose total income is so small that he is "exempt from income tax or pays at a lower rate, can get "the income tax which has been deducted on the dividend "warrant returned to him."

Now the principle of treating the shareholder for revenue purposes as if he were a partner with his co-shareholders, if carried to its logical conclusion, would render it improper for a company ever to deduct tax on paying a dividend. For if a partnership pays no tax on its profits, a partner's share cannot be diminished by deduction of tax. If, on the other hand, the partnership does pay income tax on its profits, all that can be distributed amongst the partners will be the net profits left after payment of the tax, and no further deduction for tax can be made, and this is true whether the whole or only a portion of the net profits are distributed. The principle would also lead to the logical conclusion that, for the purpose of grossing-up a dividend for sur-tax purposes, it would be necessary to ascertain what was the average rate of tax paid by the company on the whole of its profits that had been divided and to gross-up at the rate so ascertained. But the Legislature unfortunately thought it right by r. 20 to give a company an express power to deduct tax when paying dividends out of profits and gains " to be charged." I say unfortunately because the rule, particularly in view of its later developments, has given rise to some difficulty. This is due to the fact that a company when distributing net profits by way of dividend does not in truth deduct tax from the dividends at all, even though it should purport so to do. For the deduction of tax has already been made when ascertaining the net profits. Should the company, therefore, purport to deduct tax from the dividends, the only result would be that it would distribute less of its net profits than it would do were no such deduction made. The sum deducted will be retained by the company and will be available for distribution as net profits in a subsequent year. A deduction of tax would no doubt be necessary if the company purported to be distributing by way of dividend the whole of its gross profits. But in such a case the so-called dividend of gross

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
CULL.

Lord Romer.

profits would not really be a dividend in the sense in which the word is used in r. 20. For the company cannot properly distribute its gross profits among its shareholders. All that the company would in fact be doing by going through the form of declaring the gross dividend and paying it less tax would be to intimate to its shareholders for sur-tax and abatement purposes what dividend they would have received had the gross profits been divided. The truth is that, when enacting r. 20, the Legislature failed to bear in mind what has now been determined to be the true relative positions of a company and its shareholders for revenue purposes and gave power to a company to deduct tax from the net dividend as though it resembled for tax purposes interest on its debentures. The rule, however, must be read as applying to a dividend regarded as a distribution amongst partners of the net profits of the concern, and, so read, it gives a company no power that it would not possess had the rule never been enacted. For obviously a company can deduct tax from its gross profits before paying a dividend, the shareholders being entitled to nothing more than the net profits. Equally obviously a company can deduct the tax if it thinks fit to do so from the net profits, though the only effect of doing so will be, as I have already pointed out, to diminish the amount of net profits being distributed. The result would seem to be that whenever a company declares a dividend of its gross profits tax will, of course, be deducted, and the net dividend must be grossed-up for sur-tax purposes, and that when the company declares a dividend of its net profits the dividend must always be grossed-up for sur-tax purposes, whether the company does or does not purport to deduct the tax, unless the dividend is being paid out of profits that are not chargeable with tax at all.

I have so far treated the case on the footing that the only relevant statutory provisions are those to be found in the Act of 1918. But s. 39 of the Finance Act, 1927, provides that the deduction from a dividend that a company may make is a deduction of tax at the standard rate for the year in which the amount payable becomes due. This, again, seems to be inconsistent with the correct view of the relative position, for revenue purposes, of the company and the receiver of the dividend; for the rate of tax deducted from the dividend may bear no relation to the rate of tax paid by the company. But even so the power to deduct is quite unnecessary. For the company is still unable to distribute more than its net profits left after deduction of the tax that it has paid, and a deduction of tax from net profits will again merely affect the amount of net profits being distributed. Whenever a dividend is paid out of net profits, by which I mean profits that have been taxed, a grossing-up will still be necessary for sur-tax and abatement purposes, whether the company does or does not purport to deduct tax. The section in question will merely affect the rate at which the grossing-up is done.

But I must now turn to s. 7 of the Finance Act, 1931. Sub-s. 1 of that section enables a company to deduct tax when distributing profits that have never been brought into charge to tax as that phrase was interpreted in *Attorney-General* v. *Metropolitan Water Board*. (1) This was, therefore, an entirely new power conferred upon the companies, and its exercise may have an important effect upon its shareholders. Before the Act was passed, if a company distributed profits that had not been brought into charge, no grossing-up took place or ought to have taken place even if the company purported to deduct tax. The deduction merely reduced the amount of the profits divided. But since the Act a distribution of untaxed profits, such as are mentioned in sub-s. 1, must if paid under deduction of tax be grossed-up for sur-tax purposes. If not paid under deduction of tax they need not be grossed-up. Such seems to be the effect of sub-s. 2 of s. 7 as interpreted in *Neumann's* case. (2)

The position, therefore, seems to me to be as follows: If a company distributes by way of dividend profits that have been brought into charge to tax the dividend must be grossed-up for sur-tax purposes even though the company does not purport to deduct income tax. This is not (as has

(1) [1928] 1 K. B. 833. (2) [1934] A. C. 215.

sometimes been thought to be the case) because when there is no purported deduction of income tax the company is giving the shareholder in addition to the dividend something extra in the shape of a freedom from liability to tax, because the shareholder is never subject to any such liability. It is because the income tax on the profits has already been paid. *Inland Revenue Commissioners* v. *Pearson* and *Inland Revenue Commissioners* v. *Pratt* (1) were cases of this sort, and were in my opinion rightly decided, though I cannot agree with all the reasons given by Lawrence J. for his decision. If, on the other hand, a company distributes by way of dividend profits and gains for a year that have not been charged to tax but which under the provisions of the Income Tax Acts would fall to be included in computing the liability of the company to assessment to tax for that year, if the computation had to be made by reference to such profits and gains, grossing-up of the dividend for sur-tax purposes will, in my opinion, be necessary only in cases where the company has in fact made a deduction for tax. In such a case grossing-up is made obligatory by sub-s. 2 of s. 7 of the Finance Act, 1931. But for that section no grossing-up could be required, for the dividend would be a share of profits that were not liable to be brought into charge and could be properly distributed in full among the shareholders. The only question, therefore, to be determined in the present case is whether the dividend falls within s. 7, sub-s. 2, for we are invited by the Crown to treat the case as though no part of the profits of the company for the year ending January 31, 1934, had been brought into tax.

In my opinion it does not. The company has made it quite clear that it has made no deduction for tax, it being expressly stated in the resolution for the dividend that it should be paid "without deduction of tax." The amount received by the appellant cannot, therefore, be regarded as being a net amount within the meaning of the sub-section as interpreted in *Neumann's* case. (2) For these reasons I respectfully differ from Finlay J. He thought that there was no difference

(1) [1936] 2 K. B. 533.

(2) [1934] A. C. 215.

between the expression "without deduction of tax" and "tax free." In this I cannot agree with him. Lord Wright pointed out in *Neumann's* case (1) that the phrase "tax free" indicates that the dividend is net and under deduction of tax. It is, therefore, the precise opposite of "without "deduction of tax."

It only remains to say a word or two about *Neumann's* case. (2) The relative positions for income tax purposes of shareholders and their company being what they are there held to be, a real difficulty arises in a case such as that was, of a company having profits taxable under Sch. A. Suppose such a company having 10,000*l*. profits derived from house property of which the assessment value for Sch. A is 5000*l*. Income tax being at the rate of 5*s*. in the £ the company will pay 1250*l*. in tax and can distribute 8750*l*. among its shareholders. If it does so without deduction, the shareholders plainly can be grossed-up to 10,000*l*., that being the sum that under deduction of tax at 2*s*. 6*d*. in the £ will produce 8750*l*. If the company purport to pay under deduction of tax, as it has the power to do, the only effect will be that it will distribute a sum less than 8750*l*. by the amount of the tax deducted. Now suppose that for some reason the company distributes less than the 8750*l*.—say 4375*l*. Ought this to be grossed-up to 5625*l*. by the addition of the 1250*l*. tax or ought it only to be grossed-up at 2*s*. 6*d*. in the £ to 5000*l*. ? In the latter case the other 4375*l*. will also be grossed-up to 5000*l*. after it is distributed. In the former case, the second 4375*l*. after it is distributed will not be liable to be grossed-up at all. It will have to be treated as a sum that is not taxable at all. Now this was, I suspect, the position of the 4275*l*. in *Neumann's* case. (2) It was the sum remaining in the company's hands after the profits to the amount of the Schedule A assessments had been distributed. The persons to whom those profits had been distributed would no doubt have been grossed-up for sur-tax purposes at the full rate of current income tax and not merely at the average rate of tax that the company was liable to pay in view of the

---

(1) [1934] A. C. 242.

(2) Ibid. 215.

C. A.
1938

INLAND REVENUE COMMISSIONERS *v.* CULL.

Lord Romer.

Salisbury House decision. (1) The 4275*l.* was, therefore, a sum which the shareholders were entitled to treat as a gross dividend, and so the House of Lords held. The company had not in fact made a deduction in that case. Had they done so the sum paid after deduction would still have remained a gross sum. The company would merely have failed to distribute the whole 4275*l.*

In my opinion the appeal should be allowed.

MACKINNON L.J. There is only one thing about this case of which I am certain—namely, that it presents perhaps the most difficult problem I have ever attempted to solve. That difficulty results from three factors: first, the extraordinary obscurity under the Income Tax Acts of the relative positions of a company and its shareholders as to the payment of income tax; secondly, the increase of that obscurity resulting from the introduction of super-tax or sur-tax; and, thirdly, the difficulty of ascertaining with certainty the effect of the case that is said to be most relevant—namely, the decision of the House of Lords in *Neumann's* case. (2)

The most illuminating explanation of the historical origin of the first-mentioned obscurity I find in the utterance of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ld.* (3) It was read by Lord Tomlin in *Neumann's* case (4), and I need not read it again. But though that may give the reason for the obscurity, it does not dissipate it, still less does it excuse it. In fact a company is a persona distinct from its shareholders, and they are not even quasi partners. In the attempt to grope their way through the region of make-believe thus created various acute minds have been led into error. For instance, Swinfen Eady L.J. said: "where the duty is "paid by a company in respect of the gains and profits of its "business it pays the income tax as agent for its shareholders": *Brooke* v. *Commissioners of Inland Revenue.* (5) And Scrutton L.J. (in the same case) said (6): "I am quite clear

(1) [1930] A. C. 432.
(2) [1934] A. C. 215.
(3) [1923] A. C. 744, 769.
(4) [1934] A. C. 215, 223.
(5) [1918] 1 K. B. 257, 267.
(6) Ibid. 270.

"that a company in paying income tax at the source at "any rate pays as agent of the shareholders." But Viscount Cave (*Inland Revenue Commissioners* v. *Blott* (1)) says: "Plainly a company paying income tax on its profits does "not pay it as agent for its shareholders." And as the noble Viscount was delivering his opinion in the House of Lords, I must take it that Swinfen Eady L.J. and Scrutton L.J. were wrong.

Entertaining, as I do, a lively expectation that I may be held to be wrong in this, or in any judgment, about income tax, I comfort myself in anticipation by the thought that I err in such distinguished company.

Whatever may be the true analysis of the position and relation of the company and its shareholders as to income tax, it seems to be clear that when the company has paid, or by a reserve has provided for, income tax on its profits, and distributed its net balance after such payment, or reserve, to the shareholders, each shareholder is not liable to be assessed to tax on what he receives. His liability for tax at the standard rate has been discharged by what the company has done. But what the company has done has not discharged his liability for sur-tax, if his total income exceeds the sum that attracts sur-tax: nor has it imposed income tax upon him, if his total income is within the exemption from tax. In the former case he must include a sum in respect of the dividend in his return for sur-tax: in the latter case he can, by making the proper claim, recover back the tax notionally paid by him through the action of the company.

In the present case the Commissioners appear to have decided in favour of Mr. Cull on the ground that the description "without deduction of tax" has not the same meaning as "tax free." And in the argument before us great reliance was put upon the taste or skill of the directors in the choice of adjectival expressions. I cannot think that the liability of a shareholder for sur-tax can depend upon such qualities in the directors. It must depend upon the true nature of the sum of money received by the shareholder, and upon what the directors have done before they paid it to him: it cannot depend upon what they say to him when they pay it.

---

(1) [1921] 2 A. C. 171, 201.

In the ordinary case a company which has paid, or made provision for paying, income tax on its profits, and distributes some, or all, of the balance to its shareholders, does so by sending a cheque for £N to a shareholder, with an accompanying voucher—" Dividend £G, less income tax £T, net "amount £N." The shareholder who is within the class privileged to pay sur-tax has to include £G in his return. The shareholder who is fortunate enough to have a very small income can claim to be paid £T by the authorities.

In the less ordinary case a company which has paid, or made provision for paying, tax on its profits, employs a different phraseology in distributing some, or all, of the balance among its shareholders. It does not say: " Dividend "£G, less tax £T, net amount £N." But it states the dividend as " £N, free of income tax." But, of course, the variation from the other form is a mere matter of words, not of substance. If a company has issued " six per cent. preference shares free "of income tax," it will, on a 100*l.* holding, send out a warrant in the form, " Dividend 6*l.* free of income tax," and attach a cheque for 6*l.* If income tax were perpetually at 5*s.* in the £ (which Heaven forbid !), these shares might just as well be called " Eight per cent. preference shares," and the dividend warrant then be in the form, " Dividend 8*l.*, less tax 2*l.*, net "amount 6*l.*" If it were in that more familiar form, the shareholder liable to sur-tax would have to include 8*l.* (G) in his return. If it was in the form " 6*l.* free of income tax " (N), the shareholder was at one time put to a little more trouble, because he had to go through the calculation required to result in the figure 8*l.* (G). But in obedience to s. 33 of the Finance Act, 1924, the company now saves him that trouble, usually, I think, by printing on the back of its voucher the £G amount relative to the £N shown on its face as the sum paid " free of tax." In such a case the matter becomes hardly even a matter of words, but merely of the parts of the paper on which they appear. Instead of putting on the face "£G less £T, i.e., £N payable," it puts on the face "£N "amount payable," and on the back "£G is the result if £T "be added to £N."

Though all this is elementary, it seems to me to illustrate that, as a matter of substance and not of phraseology, if a company which has paid, or has made provision for paying, tax on its profits, distributes a dividend to its shareholders which is stated to be £N (that is the amount for which the cheque is filled up), the result is the same whether the dividend of £N is described as " free of tax " or " without "deduction of tax," or " actual," or by any other form of words, or with no words of description being added at all. The substance of the matter is that the shareholder is being paid a piece of income on which he is not liable to be directly assessed to income tax. In the normal case that is not because the sum in question is a sum which does not attract income tax, but because his tax upon it is deemed in some way to have been paid by what has been done by the company. If, therefore, the sum he receives, £N, is a sum on which notionally he has paid £T as tax, he must add £T to £N, and include the resulting £G in his sur-tax return.

I say " in the normal case." *Gimson* v. *Inland Revenue Commissioners* (1) was an abnormal case. The shareholder there received from the company £X, which was called a dividend. But it was not a payment to the quasi-partner of a share of profits of the quasi-partnership, on which income tax had been paid, or would have to be paid, by the company. In the mysterious language of r. 20 of the General Rules, it was not any dividend of the " profits or gains to be charged "on any body of persons," and in paying it " the body of "persons " would not be " entitled to deduct the tax appro- "priate thereto." For the money, of which £X was paid to Gimson as his share or dividend, was a sum made up from two sources, (*a*) from capital moneys, and (*b*) from profits of the company that were not liable to tax. Gimson was not liable to be directly assessed to tax on the £X he received. But that immunity arose, not because tax upon it had been notionally paid by what the company had done, but because

(1) [1930] 2 K. B. 246.

it was money on which neither the company nor the shareholder was, having regard to its nature, liable to pay tax. And as sur-tax is only payable upon items of income on which the subject has in fact, or notionally, paid, or is liable to pay, income tax, Gimson was not called upon to include the £X in his return for sur-tax, after " grossing it up "—to use that lamentable verb which the curse of sur-tax has imposed upon the English language.

In the present case the 21,000*l.* received by Cull from the company clearly did not possess one aspect of the abnormality of the sum received by Gimson in his case. Cull received a share not of any capital sum, but of the trading profits of the company. Then can it be said that what he received was a share of profits of the company that were not liable to income tax ?

The Case finds that the company's net profits for the year ending March 31, 1934, were 559,374*l.*, and it was a part of these net profits that brought Mr. Cull his 21,000*l.* The Case further finds that " owing to previous losses the company "was not liable to be charged to income tax for the year "ending 5th April, 1934," but that the balance of 559,374*l.* was arrived at after putting to reserve 99,114*l.* as "a reserve "for income tax which would become chargeable in respect of "the next financial year which would be assessed on the "basis of the company's profits for the year to 31st March, "1934." That means that when the company paid Cull 21,000*l.* as part of its net balance of trading profits of 559,374*l.*, it had not yet paid income tax on the 559,374*l.* But it would in due time be liable to pay it ; 99,114*l.* had been set aside in order to pay it ; and the net figure of 559,374*l.* had been arrived at after making that reserve. In order that a shareholder may be immune from assessment to income tax on a dividend he receives, by virtue of his tax having been notionally paid by what the company has done, it is not necessary that the company shall in fact have paid the tax before it pays him the dividend. It is obviously enough if the company is liable to pay it, and is going to pay it in due course. If I remember aright, this is reflected in the terms of the voucher attached to every ordinary warrant, by which a secretary certifies that the tax will be paid to the proper officer, not that it has been paid.

There remains one further fact. The company paid Cull 21,000*l*. on March 31, 1934, that is, during the financial year ending April 5, 1934. It was only liable to pay the income tax on the 559,374*l*. in the financial year ending April 5, 1935. Does that make any difference? Though strange things result from the income tax legislation, it would be very strange if Cull should not be liable for sur-tax on 7000*l*. in respect of a payment to him on one day, but would be so liable in respect of the identical payment if it had been made a week later. I do not think it does make any difference. And I have at times had a glimmering idea that s. 7, sub-s. 1, of the Act of 1931 says that it shall not make any difference. But having read that sub-section over and over again, I still am in doubt whether it has yet conveyed any meaning at all to my mind. It is a single sentence containing 138 words. I believe the Library of the British Museum could be searched in vain for the discovery of a sentence to outdo it in obscurity.

The Case further states that the first contention on behalf of Mr. Cull was that the 21,000*l*. "was not a 'tax free' "dividend, but a dividend of 21*s*. per share from which the "company was entitled but was not bound to deduct income "tax." If the company was so entitled, it must be because, in the language of r. 20, it was " a body of persons " paying a dividend out of " profits or gains charged [with income tax] " before any dividend thereof is made." That must also mean that, if the directors had been so minded, they might have declared this dividend in the form, " Dividend of " 28*s*. per share, less 7*s*. income tax, net dividend 21*s*." ; in which case Mr. Cull clearly must have included the 28*s*. figure in his sur-tax return. Or it might have declared the dividend in the form, " Dividend 21*s*. free of tax " ; in which case again Mr. Cull must have put down the 28*s*. figure in his sur-tax return. But it is said that because they adopt the form, " Dividend 21*s*. without deduction " of income tax," Mr. Cull need only put down the 21*s*.

figure. The decision of the Special Commissioners accepted this, and therefore seems to have been based solely on this variation of language.

As I said before, I think it is impossible that a shareholder's liability for sur-tax can depend upon the form of words in which directors of a company choose to characterize the dividend they pay to him. His liability must depend upon the essential nature of the payment. Looked at in that way, this was a payment of a dividend by way of a share of the profits of the company, on which profits the company was at the proper time liable to pay income tax. (By this time the company has no doubt in fact paid it.) That being so, this dividend when received by Mr. Cull was not liable to assessment to tax in his hands. For it was in his hands income on which notionally he had paid tax, and a sum which notionally had by such payment been reduced from a larger sum. It follows, in my opinion, that he must include that larger sum in his sur-tax return.

It remains for me to consider whether this result is affected, or my opinion must be revised, by reason of the decision of the House of Lords in *Neumann* v. *Inland Revenue Commissioners* (1), being the case principally relied on by the appellant. That was, again, an abnormal case. The Salisbury House Company put to reserve a sum of money to provide for additional income tax on their profits in case they should lose the suit, *Fry* v. *Salisbury House Estate, Ld.* (2) Having won that suit, they distributed the whole sum so set aside among their shareholders. Neumann, who was one of them, received 4275*l*. This was first described in an accompanying letter as

"Gross amount of dividend	£5343
"Less tax at 4*s*. in the £	1068
	£4275."

But in a subsequent communication the payment was described as a dividend of "5 per cent. actual," and the former account was amended to

---

(1) [1934] A. C. 215.

(2) [1930] A. C. 432.

" Gross amount of dividend	£4275
" Income tax appropriate	nil
	£4275."

Neumann's case (1) ensued upon the question whether he must include an item in respect of this dividend in his return for sur-tax, and, if so, whether that item must be 4275*l.* or 5343*l.*

The House of Lords decided that an item in respect of this dividend must be included in his sur-tax return. I understand this to be on the ground that the company, by paying its income tax under Sch. A, had discharged Neumann's liability for income tax on his dividend. If, therefore, his dividend was income on which he had had, in fact or notionally, to pay income tax, it was income that was liable to sur-tax. If this be so, I confess I should personally have thought that what he received must be regarded as the net sum resulting from the notional deduction of tax from a larger amount, and that therefore he must put that larger amount into his sur-tax return.

But their Lordships held that he need only insert 4275*l.*, the sum he actually received, and not 5343*l.* The question is, What were the precise reasons for this part of their decision, and whether those reasons can avail the appellant in this case to establish that he need only insert in his sur-tax return the sum he received, 21,000*l.*, and not 28,000*l.*

Of one thing I am quite sure. Their Lordships did not base their decision on the fact that the directors of the company had selected the adjective "actual," or had used any particular language, in order to characterize the dividend they paid. It is clear that all such verbal experiments by a board of directors must be immaterial.

The reasons for this part of the judgment, which was on the Crown's cross-appeal, are in a small compass. Lord Tomlin dealt with it in one paragraph (2) and Lord Wright at the

(1) [1934] A. C. 215.

(2) Ibid. 230.

end of his judgment. (1) Lord Warrington merely expressed his concurrence with Lord Tomlin.

I am not sure that the reasoning of Lord Tomlin and of Lord Wright is exactly the same. Lord Tomlin appears to put it on the ground that the higher sum of 5343*l*. "not only "never has come to him [Neumann] but has never existed in "fact." Lord Wright, as his main reason, or in addition, lays emphasis on the word "net" in s. 7, sub-s. 2, of the Act of 1931. Lord Wright says (2): "What was distributed, being "4275*l*., was . . . . the gross amount; the Company, though "authorized to deduct tax from it, was not bound to deduct "it, and did not in fact do so. I cannot see any justification "for describing the sum distributed as a 'net amount' and "hence I conclude that s. 7, sub-s. 2, does not apply."

I think Lord Wright is here referring to the same fact as Lord Tomlin—namely, that in the special circumstances of that case the company only had 4275*l*. which they could distribute to Neumann. If they deducted tax at all they could only have deducted it from 4275*l*., since that was all they had. They could not have deducted it from 5343*l*., since they had not got 5343*l*. Hence 4275*l*. could not be the "net" amount received. And hence Neumann could not be "deemed" to have received 5343*l*., since 5343*l*. never existed.

If that be the true basis of that decision, it depended on the very special facts of that case. But no such special facts exist in this case. The company here distributed 559,374*l*., which included 21,000*l*. to Mr. Cull. But 559,374*l*. was not all they had got. They had in addition 99,114*l*. which they had set aside to meet the tax on the 559,374*l*. As regards the 7000*l*. sought to be added to Cull's 21,000*l*. for the purposes of his sur-tax that sum did not come to him, but it did exist in fact. It did not come to him, because the company retained it, and in fact retained it as part of the reserve for income tax. And that being so, I see no difficulty in describing the 21,000*l*. as the "net amount" received by Cull, and making s. 7, sub-s. 2, apply to it.

(1) [1934] A. C. 241, 242.

(2) Ibid. 243.

C. A.
1938

INLAND REVENUE COMMISSIONERS *v.* CULL.

In the result I think this appeal must be dismissed with costs.

Appeal dismissed.

Leave to appeal to the House of Lords was granted.

Solicitors: *Freshfields, Leese & Munns; Solicitor of Inland Revenue.*

H. C. G.

LLOYDS BANK, LIMITED *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

C. A.
1938
March 9, 10.

[1935. L. No. 2538.]

Principal and agent—Mercantile agent—Pledge of documents—Surrender by pledgees to pledgors as trustees for sale—Unauthorized pledge of documents by pledgors to third parties—" Owner "—" Mercantile " Agent "—Validity of second pledge—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 1, *sub-s.* 1 ; *s.* 2, *sub-s.* 1.

The plaintiffs advanced money to S. & Co. and received by way of security documents relating to merchandise on the terms set out in a letter of hypothecation and two agreements which conferred on the plaintiffs an immediate right of sale. The plaintiffs then surrendered the documents to S. & Co. to enable them to sell the merchandise on S. & Co. signing trust receipts constituting themselves trustees for the plaintiffs. S. & Co., unknown to the plaintiffs, pledged the documents with the defendants, who acted in good faith and without knowing that the transaction was not in order. S. & Co. having gone into liquidation, the plaintiffs sued the defendants for the return of the documents or damages for their detention or conversion:—

Held, that the plaintiffs were " owners " of the goods represented by the documents within s. 2, sub-s. 1, of the Factors Act, 1889, as being the persons who could authorize a sale of the goods and that S. & Co. were mercantile agents within the sub-section, so that the pledge of the documents by S. & Co. to the defendants in the ordinary course of their business was valid. Even if the plaintiffs had not had an immediate power of sale, the result would have been the same, as the plaintiffs and S. & Co. would together have been the " owners " in that event.

Decision of Porter J. [1937] 2 K. B. 631 affirmed.

APPEAL from a decision of Porter J. (1)

In December, 1934, and January, 1935, the plaintiffs, Lloyds Bank, Ld., advanced money or gave banking accommodation to a company named Strauss & Co., Ld. (hereinafter called " the company "), which carried on business in London and Bombay, to the extent of 57,500*l.* against or by negotiating or purchasing bills of exchange or documents in the form thereof drawn on behalf of the company in Bombay on the company in London. The plaintiffs received by way of security bills of lading and invoices in

(1) [1937] 2 K. B. 631.

respect of certain merchandise on the terms set out in a letter of hypothecation dated May 21, 1930, and two agreements dated August 31, 1933, and December 14, 1934. The material terms of these documents are stated in the judgment of Sir Wilfrid Greene M.R. The bills of exchange were accepted by the company in London.

In January, 1935, the plaintiffs handed to the company in London the bills of lading and invoices to enable them to sell the merchandise as trustees for the plaintiffs. The documents were handed over on the terms of two letters dated January 2 and 14, 1935, both of which were in the following terms:—

"Trust Receipt.

"To Lloyds Bank, Ld.

"Dear Sirs,—We hereby acknowledge the receipt of the "undermentioned documents under lien to you and undertake "to and declare that we act as your trustees for the landing, "storage and sale of the relative merchandise. We also "undertake that the said merchandise will be stored in approved "warehouses separate from any other goods, whether belonging "to ourselves or other persons.

"We also undertake that the proceeds of the sale of the "said merchandise or any portion thereof will be received by "us as your trustees and kept separate from other monies "and will be remitted to you as and when received by us.

"We also undertake to keep the said merchandise fully "insured, the relative policy or policies of insurance being "held, and the proceeds thereof, or of any other insurance "of the said merchandise, being received by us as your "trustees, and remitted to you as and when received.

"We further undertake to return to you on demand the "balance of the said merchandise in respect of which you "may not have received proceeds.

"Yours faithfully,
"For and on behalf of
"Strauss & Co., Ld.,
"E. H. Lessing,
"Director."

This practice by the plaintiffs of surrendering documents to the company against trust receipts had been in existence since June, 1928.

After January 14, 1935, the company, who were in financial difficulties, unknown to the plaintiffs pledged with the defendants, the Bank of America National Trust and Savings Association, the documents referred to in the trust receipts. The defendants neither knew nor had any ground for suspecting that the transactions were not in order in every respect. On January 29, 1935, the Official Receiver was appointed provisional liquidator of the company, and the various creditors of the company were left to realize such security as they had. In November, 1935, the plaintiffs, by their solicitors, claimed from the defendants the value of the merchandise and an account, but the defendants refused to accede to that claim. The plaintiffs accordingly brought this action, claiming the return of the documents or their value, or damages for their detention or conversion.

The defendants, while not admitting that the company had deposited with them any of the documents referred to, wrongfully or in breach of any duty to the plaintiffs and denying the conversion or wrongful detention of the documents, pleaded that they had received the documents as security by way of pledge for money advanced by them to the company, who were the owners of the documents. Alternatively, they said that the company were the mercantile agents of the plaintiffs within the meaning of the Factors Act, 1889 (1), and were in possession of the documents with the consent of the plaintiffs as owners, and in pledging the documents were acting in the ordinary course of business, the defendants acting in the matter in good faith and without notice.

Porter J. said that the substantial question was whether

---

(1) By s. 1, sub-s. 1, of the Factors Act, 1889: "The expression 'mercantile agent' shall "mean a mercantile agent having "in the customary course of his "business as such agent authority "either to sell goods, or to consign "goods for the purpose of sale, or "to buy goods, or to raise money "on the security of goods."

By s. 2, sub-s. 1: "Where a "mercantile agent is, with the

the Factors Act, 1889, applied. The rule that authority to sell gave no authority to pledge was firmly established at common law, and one of the objects of the Factors Act was to enable a mercantile agent entrusted with goods to give a good title by way of sale or pledge, notwithstanding the absence of authority to do the act. The statute required an owner, a mercantile agent, possession of the goods or documents of title by the agent with the owner's consent and complete good faith in the purchaser or pledgee. Possession by the company with the plaintiffs' consent and complete good faith were admitted, but the plaintiffs denied that they were "owners" or the company mercantile agents. The pledgees here had in his view no power of sale until after default, but he thought that such a pledgee was the owner within the meaning of the Factors Act, provided that, in giving his instructions for sale, he had the assent of the person in whom the general property was vested. It followed that the plaintiffs were owners within the meaning of the Act. He also thought that, having regard to the trust receipts, the company were employed as mercantile agents. The action therefore failed and must be dismissed.

The plaintiffs appealed. The appeal was heard on March 9 and 10, 1938.

Sir William Jowitt K.C. and *James Wylie* for the appellants. Porter J. was in error in holding that the plaintiffs were "owners" within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889. A pledgee only has a special interest in the goods pledged, and the general ownership remains in the pledgors :

"consent of the owner, in possession of goods or of the documents "of title to goods, any sale, pledge, "or other disposition of the goods, "made by him when acting in "the ordinary course of business "of a mercantile agent, shall . . . . "be as valid as if he were expressly "authorised by the owner of the "goods to make the same ; provided that the person taking "under the disposition acts in "good faith, and has not at the "time of the disposition notice "that the person making the "disposition has not authority to "make the same."

Sewell v. *Burdick* (1) and *The Odessa.* (2) But although the pledgee has not the ownership of the goods, he has sufficient authority to maintain an action for trover or detinue: *Sewell* v. *Burdick* (1) and *Reeves* v. *Capper* (3); see also *Bristol & West of England Bank* v. *Midland Ry. Co.* (4) and *Nyberg* v. *Handelaar.* (5)

Further, in parting with the custody of the documents of title for the purpose of sale on the terms of the trust receipt, the plaintiffs lost none of their rights as pledgees: see *North-Western Bank, Ld.* v. *Poynter, Son & Macdonalds* (6); *In re David Allester, Ld.* (7); and *Official Assignee of Madras* v. *Mercantile Bank of India.* (8) None of these cases have to do with the Factors Act, 1889. Here on the construction of the letter of hypothecation and the subsequent two documents, the plaintiffs were given no right of sale until after the company had made default, and therefore as the company had accepted the bills of exchange there could be no right of sale until the company made default on the bills maturing. It is true that in *North-Western Bank* v. *Poynter* (6) the pledgee was referred to as owner, but there the learned judge was making his own dictionary. Further the pledgee he was referring to had an immediate right of sale. The same applies to the other two cases, and *Official Assignee of Madras* v. *Mercantile Bank of India* (8) differs fundamentally from the present case. But for the Factors Act, 1889, the plaintiffs would have a clear case, for at common law a person authorized to sell goods was unable to make a valid pledge. But in the case of a mercantile agent within the meaning of s. 1 of the Act, he is given statutory authority under s. 2, sub-s. 1, to sell or pledge goods entrusted to him by the owner. The first question under the Act is whether the plaintiffs were owners within the meaning of the Act. No case has ever been decided under the Act where the owner was not an owner in the popular sense of the word. Never before this has it been suggested that a pledgee was the owner. But even if "owner" in s. 2 has a wider meaning,

(1) (1884) 10 App. Cas. 74.
(2) [1916] 1 A. C. 145.
(3) (1838) 5 Bing. N. C. 136.
(4) [1891] 2 Q. B. 653.
(5) [1892] 2 Q. B. 202.
(6) [1895] A. C. 56.
(7) [1922] 2 Ch. 211.
(8) [1935] A. C. 53.

the word must at least denote some one with an immediate right of sale. Even that would not suffice in the case of a pledgee, but here the plaintiffs were pledgees without an immediate right of sale. They had the right to prevent the company from selling and all that they did was to remove that clog. The company had all the general rights of an owner subject to the clog imposed by the pledge. The company were therefore the owners within the meaning of the Act.

The second point that arises under the Act is whether the company were mercantile agents. An attempt was made at the hearing to show that they had sold on commission for other people, but this attempt failed. The only ground then on which they could be called mercantile agents was that they sold their own goods under pledge to the plaintiffs by virtue of trust receipts. That is not a valid ground. It is true that a man may become a mercantile agent as the result of one transaction, but the hall-mark of the agent is that he earns his living by selling on commission, and there is no suggestion that the company had ever obtained a commission for selling goods. But even if they could be said to be mercantile agents, they were not acting in the ordinary course of business, and therefore were not mercantile agents within the meaning of the Act. Further, even if the appellants failed on both these points, it would still have to be shown that the plaintiffs entrusted the goods to the company as agents. The bank never gave instructions to the company to sell, but merely permitted a sale. The point here is of great importance, because, if the defendants succeed here, banks will hesitate to use trust receipts in future.

Although there are no authorities under the Factors Act, 1889, which are directly in point here, there are a number of authorities which may be of assistance to the Court. Thus there are a number of cases where it has been emphasized that it is essential that goods should be entrusted to an agent in that capacity. The cases which may assist the Court are *Monk* v. *Whittenbury* (1); *Jenkins* v. *Usborne* (2); *Lamb* v. *Attenborough* (3);

---

(1) (1831) 2 B. & Ad. 484.

(2) (1844) 7 Man. & G. 678.

(3) (1862) 1 B. & S. 831.

C. A.
1938

LLOYDS BANK, LD.
v.
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

Baines v. *Swainson* (1); *Heyman* v. *Flewker* (2); *Fuentes* v. *Montis* (3); and *Cole* v. *North-Western Bank.* (4) Cases decided since the passing of the Factors Act, 1889, are *Oppenheimer* v. *Attenborough & Son* (5); *Weiner* v. *Harris* (6); *Lowther* v. *Harris* (7); *Staffs Motor Guarantee, Ld.* v. *British Wagon Co.* (8); and *Budberg* v. *Jerwood.* (9) There is no ground for reading the words of the Factors Act, 1889, in a sense they do not prima facie bear. That is what the respondents are seeking to do by giving each of the words "owner," "mercantile "agent," and "ordinary course of business" a special sense so as to make s. 2, sub-s. 1, apply to this case. The result would be to make the Act apply in cases where it was not intended to do so: compare *Fuentes* v. *Montis.* (3)

[SIR WILFRID GREENE M.R. Where the ownership of goods is divided so as to require the authority of more than one person to enable the goods to be dealt with, are they not together the owners for the purpose of the Act ?]

That might be so in some cases, but here the company had power to sell. The company could have agreed to sell and made a title either by paying off the bank or by getting them to join in the sale.

[They also referred to *Franklin* v. *Neate.* (10)]

Hon. Sir Stafford Cripps K.C. and *H. G. Robertson* for the respondents. It is not open to the appellants to say that the documents were not handed to the company to enable them to sell the goods as trustees for the bank, for the contrary is expressly pleaded. The same was made clear in the evidence and is indeed a necessary implication from the trust receipts. The appellants are seeking to rely on the trust receipts to show that they never divested themselves of their rights as pledgees, and, if so, they are bound by the terms of the trust receipts in all other respects. The result is that the company

---

(1) (1863) 4 B. & S. 270.
(2) (1863) 13 C. B. (N. S.) 519.
(3) (1868) L. R. 3 C. P. 268.
(4) (1875) L. R. 10 C. P. 354.
(5) [1908] 1 K. B. 221.
(6) [1910] 1 K. B. 285.
(7) [1927] 1 K. B. 393, 397.
(8) [1934] 2 K. B. 305.
(9) (1934) 51 Times L. R. 99.
(10) (1844) 13 M. & W. 481.

C. A.
1938

Lloyds Bank, Ld. v. Bank of America National Trust and Savings Association.

were agents for the plaintiffs alone or for the plaintiffs and the company. It follows that the company were holding the documents as agents for the owners for the purpose of selling goods.

It has been contended by the appellants that the plaintiffs had not an immediate right of sale under the documents, but it is clear that the letter of hypothecation gave them an immediate right of sale. This document was a continuing security for all advances, and it makes no difference that the other documents gave a more limited power of sale. The plaintiffs having a then present power of sale entrusted the documents to the company on the basis of the trust receipts. Therefore the goods were to be sold by the company not as owners but as persons entrusted with the documents by another for sale on the understanding that the documents, insurance policies, the goods and the proceeds of sale of the goods were to be held by the company on behalf of the plaintiffs. That is a mercantile transaction constituting the company agents for sale. The relationship arising from trust receipts was considered in *North-Western Bank, Ld.* v. *Poynter, Son & Macdonald.* (1) It is definitely stated there that the pledgees had entrusted goods to the pledgors for sale as their agents. That is exactly what happened in this case, and the case shows that a pledgor can be entrusted with his own goods as agent for their sale. Lord Herschell here speaks of the pledgees as owners and says that the position is the same as if the pledgees were the absolute owners. *In re David Allester, Ld.* (2), also is substantially a case of a trust receipt. The Factors Act, 1889, has to be considered in the light of the observations in these cases and in *Official Assignee of Madras* v. *Mercantile Bank of India* (3), and the first question is whether the company were mercantile agents as defined in s. 1, sub-s. 1, that is, mercantile agents having in the ordinary course of their business as such agents authority to sell goods. In *Lowther* v. *Harris* (4) it was established that a mercantile agency might exist where there was a single sale for a single person.

(1) [1895] A. C. 56, 58.
(2) [1922] 2 Ch. 211.
(3) [1935] A. C. 53.
(4) [1927] 1 K. B. 393.

C. A.
1938

LLOYDS BANK, LD. v. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

[SCOTT L.J. Do you say that the company had no right to sell although they were owners in the general sense ?]

Yes. They were selling for the plaintiffs because they were experts in the particular sort of business. They were clearly acting as mercantile agents. Again s. 2, sub-s. 1, makes it clear that "owner" within the meaning of the sub-section is a person having power to authorize the sale of the goods. It is contended that the plaintiffs had that power and therefore were the owners.

[SIR WILFRID GREENE M.R. Do you say that the pledgees are the owners or that the pledgees and pledgors together are the owners ?]

The pledgees are the owners and the pledgors the mercantile agents, for the pledgees are the persons with immediate power to sell under the instrument of hypothecation. Again the words "when acting in the ordinary course of business of "a mercantile agent" only mean that the agent must be acting exactly as a mercantile agent would act and not doing anything to arouse suspicion : see *Oppenheimer* v. *Attenborough & Son.* (1) On all these grounds it is clear that the company were acting as mercantile agents entrusted with goods by the owners within s. 2, sub-s. 1.

If the view that the plaintiffs were the owners is not accepted, then the alternative view is that the plaintiffs and the company were together the company and the result would be the same.

James Wylie replied.

SIR WILFRID GREENE M.R. This appeal from a judgment of Porter J. raises what at first sight appeared to be a question not only novel but difficult, but, now that the matter has been very fully discussed before us, the question becomes, in my opinion, a simple one and the answer not open to any real doubt.

The dispute arises out of certain commercial transactions of a very familiar type. The plaintiffs, Lloyds Bank, Ld., acted as bankers for a company, Strauss & Co., Ld., which

---

(1) [1908] 1 K. B. 221.

C. A.
1938

Lloyds Bank, Ld. v. Bank of America National Trust and Savings Association.

Sir Wilfrid Greene M.R.

carried on a merchant's business both in India and in England For the purpose of financing the purchases of goods which. that company made in India, with a view to their being shipped to Europe and there disposed of, the method adopted was, in outline, of this nature. They had an arrangement with Lloyds Bank in India under which they sold to that bank documents in the form of bills of exchange drawn by themselves on what was really themselves; although they were in one sense drawn on the London office, yet they were drawn on the same company. Drawers and drawees, accordingly, were the same, but that point is of no importance. When a bill was purchased by Lloyds Bank in India there were handed to the bank with it the shipping documents relating to the goods, and by that means there were sent by Lloyds Bank in India to Lloyds Bank in London bills and shipping documents. Those bills were in due course accepted and the business went through in the ordinary way.

Lloyds Bank regarded Strauss & Co., Ld., as a company of high standing in the matter of credit, as, indeed, in the earlier days they were; and it was the practice of Lloyds Bank in London to allow Strauss & Co., Ld., to have possession of the shipping documents in order to effect sales of the merchandise to which they related. This facility, of course, involved their parting with the shipping documents which were hypothecated to them, but when the amount owing by Strauss & Co., Ld., to the bank exceeded 50,000*l.* their practice was to part with the shipping documents only on receiving from Strauss & Co., Ld., a very familiar type of document known as a trust receipt.

In the present case Strauss & Co., Ld., obtained possession of certain bills of lading and invoices which had been hypothecated, according to this system, to Lloyds Bank, in each case on the terms of a trust receipt. The dispute which has arisen arises from the circumstances that, instead of dealing faithfully with those goods according to their obligations to Lloyds Bank, Strauss & Co., Ld., fraudulently pledged the goods by depositing the bills of lading with the defendants, the Bank of America National Trust and Savings Association.

The result is that there is in dispute a sum of some 34,000*l.*, representing the proceeds of sale of goods, and each party claims to be entitled to that sum. There is a minor point with regard to a small sum, part of that sum, which, on the view which we take of this case, it is not necessary to discuss.

The question which arises is a very short question of the construction of the Factors Act, 1889, as applied to the particular cicumstances of this case.

The matter depends in the first place on the consideration of certain documents, because it is from them that the relationship between the parties is to be ascertained. There were two documents which I may conveniently describe as covering documents, because they were documents of a general character and not confined to some particular transaction, and they formed the basis of the financial dealings between Strauss & Co., Ld., and Lloyds Bank.

The first document (I am not sure whether this was the one actually in force at the relevant time or whether it is merely an example, but it does not matter) is dated May 21, 1930, and is signed by Strauss & Co., Ld., in India and handed to Lloyds Bank in India. It is described as "Letter of "hypothecation—general (bills purchased)." It is addressed to Lloyds Bank and is signed on behalf of Strauss & Co., Ld. By it Strauss & Co., Ld., agree that "all bills and/or "documents which we may from time to time hand you "for purchase or discount, or against which you make us "advances, and the goods thereby represented, and the "proceeds thereof, are to be held by you as a continuing "security for the payment on demand of the said bills so "purchased or discounted and of all advances, banking "accommodation and/or expenses which you may make, "afford or incur to or for us in connexion therewith and all "other liabilities to you present and future." Therefore, it is a general agreement of hypothecation in respect of every manner of liability, whether on bills, on advances or on banking facilities. It proceeds: "and you are to be "at liberty to exercise all our rights (if any) as unpaid sellers "of the said goods, and without further reference to us to "sell, insure, warehouse or otherwise deal with the said "goods as though you were the absolute owners thereof." The rest of it I need not read. The document, therefore, gives a power of sale or other dealing with the goods comprised in any documents deposited with Lloyds Bank in the widest possible terms.

It was said on behalf of the appellants that the power of sale which was thereby given was a power which only arose when a demand had been made by Lloyds Bank for moneys owing to them from Strauss & Co., Ld. I cannot read the power of sale as so limited. It appears to me that it is a power of sale which could have been exercised at once, notwithstanding the fact that no demand had been made. On the view which I take of this case on other grounds, I do not think that the decision of that particular question is of importance, although my own opinion is clearly what I have stated.

The other covering document was a document signed on behalf of Strauss & Co., Ld., in England and handed to Lloyds Bank in England. It is in this form: "We "authorize and request you and/or your nominees in India "to give banking accommodation against and/or negotiate "on or before December 31, 1934, any bill or bills payable "at or at a term not exceeding three months after sight "and drawn on us by or endorsed by Strauss and Company, "Limited, and in consideration thereof we hereby agree "duly to accept any such bill or bills for any sum or sums "not exceeding in the aggregate 125,000*l.* outstanding at "any one time, this being a continuing revolving agreement "and to pay the amount of such bill or bills at maturity. "You will receive with such bill or bills but merely by way "of collateral security to you bills of lading for merchandise "grain and/or seeds together with policy or certificate of "marine insurance and invoice and we agree that in the "event of any default on our part you shall be at liberty "to sell or cause to be sold (entirely at your discretion) any "of the said merchandise by public auction or private sale "and apply the net proceeds towards payment of the said "bill or bills." That, therefore, is a special document relating to the acceptance of bills which had been purchased or discounted in India and which had been drawn or endorsed by Strauss & Co., Ld., there. In the event of any default of their obligations, which were to accept the bills and to pay them at maturity, there was a power of sale; and it is said, and I think it is said with truth, that the particular power of sale given by this document only arises on default; that is to say, in cases where a bill has been accepted it will only arise where it is not paid at maturity. That is a matter which I do not think is of any importance in this case.

There is another form before us which is exactly the same as the one which I have read, but it has a particular reference to trust receipts in these terms: "If required we will sign "a trust receipt when any documents are released to us." That was contemplating the procedure which I have already described under which, when the accommodation granted exceeded 50,000*l.*, shipping documents would be released against trust receipts.

It was the practice to release those documents, and it is important to notice the purpose for which they were released. The transaction is one so familiar and has been referred to in so many cases, and its objects are so notorious, that it is almost with apology that I refer to any allegations or evidence on the matter; but the plaintiffs, in their statement of claim, say this: "The bills of lading, invoices, and "relative merchandise referred to in paragraph 10 hereof "were handed by the plaintiffs"—that is Lloyds Bank—"to the company"—that is Strauss & Co., Ld.—"in order "to enable the company to sell the merchandise as trustees "for the plaintiffs in pursuance of the terms of the letters "of the 2nd and 14th of January, 1935." Those are the trust receipts. A passage in the evidence was referred to which also deals with that matter. Mr. William Hedley Robinson, an accountant in the Eastern department of Lloyds Bank, and concerned with the carrying on of this particular business, was asked: "You had from time to "time released to them the documents as against such trust "receipts for the purpose of their selling the goods? (A.) "Quite so. (Q.) The object of their selling the goods was "to realize moneys to pay to your bank, in order to meet "the bills? (A.) That is so." Then later he was asked: "So far as the release of the bills of lading was concerned "in these particular cases, was it your intention that Strauss "and Company should be able to give a good title to the "purchasers of the goods? (A.) Yes." The goods, therefore, were released and, when they were released, Lloyds Bank took from Strauss & Co., Ld., the trust receipt.

The trust receipt schedules a large number of bills of lading relating to a quantity of goods and also relating to bills which had been drawn under this procedure. The document is in this form. [His Lordship read the trust receipt of January 2, 1935, and continued:] On the terms of that document the bills of lading and the invoices with which we are concerned in this case were handed to Strauss & Co., Ld., and they had no right to deal with the documents in any way inconsistent with the terms of that receipt. About that there can be no possible doubt. It is to be observed that, at the date when this document was given and the shipping documents released, the particular bills with which those documents were related had not yet matured for payment. The bills in question which are referred to in the schedule to this trust receipt were three-months bills accepted on December 31, 1934, which made the due date, allowing for the days of grace, April 3, 1935. A strong point was made on behalf of the appellants of the circumstance, that, at the date when the trust receipt was signed and handed over and the shipping documents handed over, and at the date when Strauss & Co., Ld., deposited the shipping documents with the defendants, the bills had not yet become due for payment. It was said that, on the footing of that fact, the dispositions made by Strauss & Co., Ld., of the shipping documents must be regarded as having been made by them in their capacity of having the general ownership of the goods.

C. A.
1938

LLOYDS BANK, LD.
v.
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

Sir Wilfrid Greene M.R.

There is no necessity to refer to the details with regard to what Strauss & Co., Ld., did towards the defendant bank. They deposited these documents very shortly after they had got them.

On that state of facts the first question which arises is, quite shortly, this: Were Strauss & Co., Ld., mercantile agents in possession of those shipping documents with the consent of the owner? I will put on one side for the moment the question whether they were mercantile agents, because that is a question which is one on which we have not heard a very great deal of argument. I will proceed at once to the question on which the greater part of the argument has turned.

It is said: When you look at the relevant date, which is the date when Strauss & Co., Ld., came, into possession of those documents, is it true to say that they were in possession of those documents with the consent of the owner? The argument, if I understood it correctly, was of this nature, that, where goods have been pledged, the only person whom you can with correct use of language describe as the owner is the pledgor. As justification for that it is said that the pledgor is the person who has the general property in the goods and the interest of the pledgee is merely a limited and particular interest. As an abstract proposition that, no doubt, is, in substance, correct. But the question in this case is: Who is the owner for the purpose of this section? I myself find it only confusing to go into abstract questions of what the word "owner" may mean in other contexts and for other purposes. The object of the section and the history of the legislation is too familiar to require statement. When I look at the language of s. 2 of the Factors Act, 1889, itself I find in it what appears to me to be a very clear clue to the meaning of the word "owner." Sect. 2, sub-s. 1, states [his Lordship read the sub-section]. The section, therefore, on its face is contemplating that the person it describes as the "owner" will be the person who would be in a position to give express authority with regard to the dealing in question. It seems to me that a person who would not be in a position

C. A.
1938

LLOYDS BANK, LD. v. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

Sir Wilfrid Greene M.R.

to give that express authority cannot by himself constitute what is described as the owner. It may, of course, very well be, and it happens very frequently, that the incidents and rights of ownership are divided among two or more hands. One person may have the right to possession, which is one of the rights incident to ownership, and another person may have all the other rights incident to ownership. Nevertheless it is only the two of them who can confer on a third party the ownership of the property in question. It is only by their combining in an assignment that they can confer a good title. I am quite unable to read the word " owner " in this section as excluding such a case. It seems to me that, where the right of ownership has become divided among two or more persons in such a way that the acts which the section is contemplating could never be authorized save by both or all of them, these persons together constitute the owner. If it is with the consent of those persons that the mercantile agent is in possession of the documents, then he is in possession of them with the consent of the owner within the meaning of the section.

In the present case, if Lloyds Bank and Strauss & Co., Ld., had agreed to employ a broker in Mincing Lane, and with the consent of both of them, which was necessary because the bank had the right of possession, these documents had been handed to that broker and thus come into his possession, I cannot for one moment doubt that the broker would have been in possession of the documents with the consent of the owner within the meaning of the section, the owner being, for that purpose, the two of them acting in combination. In the present case, according to a practice which is as familiar as any mercantile practice can be, the person entrusted with the sale was not a third party at all, but the actual merchant himself. Does that make any difference from the point of view of the construction of the section ? In my opinion it does not. It is perfectly true (and here for a moment I am disregarding the special language of the covering documents in this case, to which I shall return later) that the pledgor obtained possession of the documents in contemplation of a sale which was to some extent in his own interest and which would affect his own title as pledgor, and to that extent may be regarded as intending to act as a principal in the transaction. But I find nothing in the section which excludes from the case contemplated the case where the mercantile agent himself has got some interest in the property with which he is dealing. It seems to me that one may have a case, and for all I know it may be a common case, where a person who is himself a mercantile agent has in combination with somebody else the ownership of goods. A mercantile agent may have some interest in goods the remaining interest in which is vested in somebody else. It seems to me quite impossible to say that, when such a mercantile agent is allowed to have possession of the goods with the consent of the other person interested, for the purpose of selling, the section does not apply, because the mercantile agent himself has also got some interest which must be brought in in order to give a purchaser a complete title. It appears to me that that would be putting too narrow a meaning on the section. In such a case the possession would be referable in part to the mercantile agent's own interest and in part to the consent of the person having the residuary interest, who in combination with the agent would be the owner for the purposes of the section.

I have dealt so far with the question whether or not the documents of title came into the hands of Strauss & Co., Ld., with the consent of the owner. In my opinion they were in the possession of Strauss & Co., Ld., by the consent of Lloyds Bank, together with Strauss & Co., Ld., themselves in so far as any consent by them was necessary.

It is said, and I think with great force, by Sir Stafford Cripps that, quite apart from the general proposition which I have been endeavouring to state, which applies, if it be correct, generally to all cases where the incidents of ownership have come into more than one hand, the bank, and the bank alone, on the particular documents of this case, was the owner for the purposes of the section. He refers to the provisions of the covering letter of hypothecation, which I have read,

C. A.
1938

Lloyds Bank, Ld. v. Bank of America National Trust and Savings Association.

Sir Wilfrid Greene M.R.

which empowers the bank to sell as though they were the absolute owners. It seems to me that by virtue of that contract the relationship of the bank to these particular goods and the documents of title representing them was the relationship of owner in that they were given power by that document to exercise all the rights of ownership over the goods. On that rather narrower ground, quite apart from the ground which I stated earlier, it seems to me that Strauss & Co., Ld., were in possession of the goods with the consent of the owners, who, on that hypothesis, would be the bank.

It is said that the trust receipt is not a document under which Strauss & Co., Ld., were constituted mercantile agents. It is said that it is not an agency document at all, but that it is merely a permission by the pledgees to the pledgors to exercise their own power of disposition. I have had some difficulty in following that argument, but, doing it the best justice that I can, it appears to be to this effect. Strauss & Co., Ld., had the general property in the goods. On the power of disposition which that general property would generally carry there was a clog, namely, the right of the bank as pledgee, and, by virtue of the transaction when the shipping documents were released and the trust receipt taken, the bank removed that clog, leaving the general property of Strauss & Co., Ld., free from the clog. The position then was that Strauss & Co., Ld., were in possession of the shipping documents as owners without any right at all in the bank, and it was as owners that they dealt with the shipping documents.

With all respect to that argument it appears to me to be completely misconceived. It fails to recognize the true relationship of Strauss & Co., Ld., to the documents which they received. It was by virtue of the trust receipt, and the trust receipt only, that Strauss & Co., Ld., obtained what they never could have obtained otherwise as against the bank—namely, possession of those documents—and the terms laid down in the trust receipt on which they obtained possession constitute them trustees for the landing, storage, and sale of the relative merchandise. It contains an undertaking that the proceeds of sale will be received as trustees for the bank, and it provides that any unsold balance of the merchandise will be returned to the bank. It appears to me, as the result of that document, which alone embodies the terms upon which they obtained back the shipping documents, to follow that, by virtue of the authority from the bank to Strauss & Co., Ld., they were entitled to sell the goods comprised in the shipping documents and to sell them (to use the words of Astbury J. in dealing with a document of this character) as trust agents for the bank. Except in that capacity and by virtue of this document they would have had no title whatsoever to do the things which this document contemplates they shall do. Without obtaining the documents from the bank (and they only obtained them by signing this document) they never could have made an effective sale of the merchandise, delivery of the merchandise to a purchaser and receipt of the purchase-money from a purchaser, because the right of the bank under the pledge would have stood in the way. It is, therefore, only by virtue of this authority that they become empowered to sell the goods.

It seems to me that the case, looked at in that way, is a clear one of an authority given to a mercantile agent who is employed in that capacity for that purpose within the meaning of the section.

I do not think it necessary to go further into the question as to the meaning of the words "mercantile agent" in connection with the particular circumstances of this case, because I think that the argument to which I have just referred relating to the trust receipt is really the substantial argument that is put forward in opposition to the view that Strauss & Co., Ld., were mercantile agents.

In the result, therefore, I have come to the same conclusion as Porter J. came to, though I am not sure that I have not arrived at it by a rather different route. In my opinion, the case is one which is covered by s. 2 of the Factors Act, and the defendants are entitled to succeed.

The appeal must be dismissed, with costs.

SCOTT L.J. I agree with the reasoning and with the result of my Lord's judgment, and do not feel that I should add anything useful by making any further observations.

MacKinnon L.J. I agree. I do not know when, as a matter of history, the practice of banks releasing documents under a trust receipt began. Sixteen years ago, in the case before Astbury J. (*In re David Allester, Ld.* (1)) I observe that it was described as a well established mercantile practice in such transactions as these, and I have an idea that it is of a very long standing.

There was some suggestion that, if we decide that a person who is in possession of documents released to him pursuant to such a trust receipt is in the position of a mercantile agent under the Factors Act, it may have a serious effect upon the continued use of the practice in the future. I do not apprehend any such danger or difficulty. The truth is that almost every aspect of commercial dealing is not proof against the possible result of the frauds, that a lawyer, thinking of the possibilities of such things, might suppose to be so easy, but which in business in fact occur so rarely. In this case Strauss & Co., Ld., in breach of good faith, and in breach of their contract, pledged the goods and thereby improperly obtained money upon the value of them; but if they had sold the goods and misappropriated the purchase price, they would only have been acting in a rather different way in breach of their duty and in breach of their contract. In that case the plaintiffs would have had no shadow of a claim against anybody except Strauss & Co., Ld. I have no doubt that this very convenient business method will continue, and can do so because the whole basis of business rests upon honesty and good faith, and it is very rarely that dishonesty or bad faith undermines it. I agree that the appeal fails.

Solicitors: *Allen & Overy; Slaughter & May.*

(1) [1922] 2 Ch. 211.

H. C. G.

CROSS *v.* BRITISH OAK INSURANCE COMPANY, LIMITED.

1938
Jan. 11.

Insurance (Motor-car)—Third-party risks—Accident involving three persons—Action by one against owner of motor-car—Service of third-party notice—Notice to insurers—Counterclaim by third party against owner of motor-car—No notice of counterclaim to insurers—Judgment for third party on counterclaim—Claim by third party against insurers—" Proceedings in which the judgment was given "—Effect of absence of notice of counterclaim—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 2, 3.

By a policy of motor insurance, issued in November, 1935, the defendants agreed to indemnify F. against third-party risks in respect of a motor vehicle. During the currency of that policy, an accident occurred, involving F., the owner of the motor vehicle, and two other persons, B. and C. B. brought an action against F. in respect of the accident, and C. was served with a third-party notice in that action. Notice of that third-party notice was duly given to the insurers. C., the third party, counterclaimed for damages against F., and recovered judgment against F. on the counterclaim. No notice of the counterclaim by the third party was given to the insurers. As that judgment remained unsatisfied, the third party brought an action against the insurers under s. 10 of the Road Traffic Act, 1934, claiming the amount of the judgment and costs.

By sub-s. 2 of s. 10 of the Road Traffic Act, 1934: " No sum " shall be payable by an insurer under the foregoing provisions " of this section—(*a*) in respect of any judgment, unless before or " within seven days after the commencement of the proceedings " in which the judgment was given, the insurer had notice of the " bringing of the proceedings . . . . " :—

Held, that as the insurers had had no notice of the counterclaim in which the judgment was given, the plaintiff could not recover against the insurers.

" The proceedings in which the judgment was given " in sub-s. 2 (*a*) of s. 10, meant " the proceedings begun by a person " who may for this purpose be regarded as a plaintiff, which results " in the judgment upon which reliance is placed as against the " insurers."

ACTION tried without a jury.

By a policy of motor insurance issued in November, 1935, the defendants, British Oak Insurance Company, Ld., undertook to indemnify a Mr. Kenneth Fowler against third-party liabilities which might be incurred by him (the insured) in respect of a motor vehicle. A certificate of insurance was duly delivered to Fowler by the insurance company.

On January 7, 1936, during the currency of the policy, there was a motor accident in which two persons, a Mr. Baker and a Mr. Samuel Cross (the plaintiff in this action), were injured. It was alleged that the accident was caused by the negligence of Mr. Fowler or of his servant in the driving of Mr. Fowler's motor vehicle.

In March, 1937, Baker (one of the persons injured) brought an action in the Birmingham County Court, alleging that he had been injured by negligence for which he said Fowler was responsible. Fowler denied liability and alleged that the accident was due to the fault of Cross. He applied to the county court for leave to join Cross as a third party, claiming against Cross indemnity or contribution.

On March 24, 1937, an order was made by the registrar of Birmingham County Court, giving Fowler leave to serve a third-party notice on Cross, and on the same date notice was given to the insurance company that that order had been made, giving leave to bring in Cross as a third party to the action brought by Baker against Fowler.

Subsequently, Cross counterclaimed against Fowler, alleging that he (Cross) had been injured by reason of the negligence of Fowler or his servant. No notice of that counterclaim was given to the insurance company.

The result of the hearing in the county court was that Cross was successful in his counterclaim against Fowler, and on June 15, 1937, he (Cross) recovered judgment for 90*l.* damages and 28*l.* 9*s.* 9*d.* costs against Fowler. That judgment remained unsatisfied.

The plaintiff, Cross, thereupon brought this action in which he claimed a declaration that the defendants, the insurance company, were liable under s. 10, sub-s. 1, of the Road Traffic Act, 1934 (1), to pay him 118*l.* 9*s.* 9*d.*, the amount of a judgment which he had obtained against Mr. Kenneth Fowler in Birmingham County Court on June 15, 1937.

---

(1) Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), s. 10: "(1.) If, after a certificate of "insurance has been delivered "under sub-section (5.) of section "thirty-six of the principal "Act" [Road Traffic Act, 1930] "to the person by whom a "policy has been effected, judg-"ment in respect of any such

The defendants denied liability and relied on sub-s. 2 of s. 10 of the Act of 1934 (1), and said that they had had no notice of the bringing of the proceedings as required by that sub-section.

Graham Rogers for the plaintiff. The plaintiff Cross having recovered judgment on his counterclaim against Fowler, the insured, and Fowler having failed to satisfy that judgment, the plaintiff is entitled to recover the amount of the judgment and the costs against the insurance company under s. 10, sub-s. 1, of the Road Traffic Act, 1934.

H. I. P. Hallett K.C. and *Stephen Chapman* for the defendants. The action is not maintainable, because the defendants had received no notice of the bringing of the counterclaim by Cross in the third-party proceedings. Sub-s. 2 of s. 10 of the Act of 1934 provides that no sum shall be payable by an insurer under sub-s. 1 of that section in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings. In this case the proceedings in which the judgment relied on was given was the counterclaim brought by the plaintiff, and on which he recovered judgment. A counterclaim is in the nature of a cross-action. The plaintiff cannot recover.

"liability as is required to be "covered by a policy under para. "(*b*) of sub-section (1.) of section "thirty-six of the principal Act "(being a liability covered by the "terms of the policy) is obtained "against any person insured by "the policy, then, notwithstanding "that the insurer may be entitled "to avoid or cancel, or may have "avoided or cancelled, the policy, "the insurer shall . . . . pay to "the persons entitled to the "benefit of the judgment any sum "payable thereunder in respect of "the liability, including . . . . "costs and . . . . interest . . . ."

(1) Sub-s. 2: "No sum shall be "payable by an insurer under the "foregoing provisions of this sec"tion—(*a*) in respect of any "judgment, unless before or "within seven days after the "commencement of the proceed"ings in which the judgment was "given, the insurer had notice of "the bringing of the proceedings."

1938

Cross v. British Oak Insurance Co.

Graham Rogers in reply. The "commencement of the "proceedings in which the judgment was given" was when the plaintiff was served with the third-party notice. The defendants had received notice of that proceeding and that was sufficient to comply with the requirement of the subsection. The plaintiff is entitled to recover.

du Parcq J. One may regret, although perhaps it is useless to do so, that the Act of Parliament is not a little clearer, and when one reads sub-s. 3 of s. 10 of the Road Traffic Act, 1934, it is difficult to resist the conclusion that the Act does not appear to deal with all the contingencies which may arise. Perhaps I should say that the Act seems to have been drafted, or at any rate finally passed, in a form which would lead one to suppose that those responsible for it had not envisaged some of the events which were not only likely, but certain, to happen, and were legislating either in ignorance or forgetfulness of the procedure in the Courts of the country. That makes the position of insurance companies difficult as well as the position of the insured, and it does not make the task of the judge particularly easy. Legislation which is enacted without regard to what happens every day in the Law Courts may cause great trouble, not so much to those who have to interpret it, but rather to those who, as business people, have to try to conduct their business according to what appears to be the meaning of the Act of Parliament.

The defendants, the insurance company, rely on sub-s. 2 of s. 10 of the Road Traffic Act, 1934, which provides that: "No sum shall be payable by an insurer under the foregoing "provisions of this section—(*a*) in respect of any judgment, "unless before or within seven days after the commencement "of the proceedings in which the judgment was given, the "insurer had notice of the bringing of the proceedings."

The question is, When were the proceedings commenced? It may be said that the proceedings were commenced when Baker commenced his action in the county court. Ultimately, Cross was served with a third-party notice, and judgment was given in favour of Cross in those proceedings which Baker commenced when he issued his plaint in the county court. Alternatively, it may be said that the proceedings in which the judgment was given began when Cross was brought in as a third party, because when Cross was brought in as a third party, it was for the first time possible for any judgment to be given which would affect his rights. When once Cross was brought in as a third party, it was, at any rate, possible that he would counterclaim, and any one receiving notice that Cross had been brought in as a third party would know, if he studied, as he should, the procedure of the county court, that there might be a counterclaim by Cross. In the further alternative, it may be said, and it has been said here, that it was when Cross counterclaimed against Fowler that the proceedings commenced in which the judgment was given.

I think that I can put aside at once the first of the possible views to which I have referred. It is of great importance to the person who ultimately recovers judgment that he should be able to recover against the insurers, and, though he is not obliged to give the notice himself, he may give it. It would have been quite impossible for Mr. Cross to take any step with a view to giving notice of his claim within seven days after the commencement of the proceedings, if by the word " proceedings " is meant the county court action instituted by Baker. The real question which I have to decide is whether the second or the third of the meanings which I have stated is to be given to the word " proceedings." If s. 10, sub-s. 2, of the Road Traffic Act, 1934, stood alone, I should certainly be disposed to think that the view contended for by counsel for the plaintiff is the right view, because I think it might well be said that the proceedings in which this judgment was given were commenced when Cross was made a third party. From that moment he had the right to counterclaim, and although, no doubt, there is ample authority for the proposition that a counterclaim is for many purposes —most purposes, I suppose—to be regarded as a cross-action and a separate proceeding in that sense, still I should have thought, looking only at sub-s. 2, that it was enough if notice were given of the commencement of the third-party proceedings. But Mr. Hallett has pointed out the difficulty in the way of such a construction when regard is had to the provisions of sub-s. 3.

The scheme of the Act is this: The mere fact that the insurer can escape his liability *vis-à-vis* the insured, by reason of something which entitles the insurer to avoid or cancel the policy, does not prevent the person injured by the tort of the insured from recovering against the insurers, but the insurers can take steps which will protect themselves. The insurers may obtain a declaration that they are entitled to avoid the policy in certain cases where it was obtained by the "non-"disclosure of a material fact, or by a representation of fact "which was false in some material particular," but if that declaration is to avail the insurer, he must obtain it "in "an action commenced before, or within three months after, "the commencement of the proceedings in which the judgment "was given." Those are exactly the same words as appear in sub-s. 2 (*a*): "the proceedings in which the judgment was "given." Even if he obtains such a declaration, the insurer is not "entitled to the benefit of the subsection as respects "any judgment obtained in proceedings commenced before "the commencement of that action [that is, the action for "a declaration], unless before or within seven days after the "commencement of that action he has given notice thereof "to the person who is the plaintiff in the said proceedings "specifying the nondisclosure or false representation on "which he proposes to rely, and any person to whom notice "of such an action is so given shall be entitled, if he thinks "fit, to be made a party thereto." That is to say, to the action for a declaration.

Let it be assumed, in order to test this question, that the proceedings in which the judgment was given are the proceedings begun by the service of the third-party notice on Cross, which would mean that in this case a proper notice had been given to the insurance company by the plaintiff. That would mean that the insurance company, to maintain their rights, would have to begin their action within three months after the third-party notice was issued, and it is to be observed that it might well be that more than three months would go by after the issue of the third-party notice before there was a counterclaim at all. Certainly, if the long vacation intervened, that might happen. Similarly, when judgment is given on a counterclaim, and the question arises whether "the proceedings in which the judgment was given" were commenced by the issue of the writ or by the delivery of a counterclaim, it is to be observed that the writ might not be served for a long time, and that the three months might expire before there was any counterclaim in existence. These considerations make one think that Parliament cannot have intended the words "the commencement of the proceedings in "which the judgment was given" to refer to the issue of the writ in a case not complicated by third-party proceedings, or to the service of third-party proceedings, in cases where the judgment was given on a counterclaim. The principle is exactly the same in each case, if one regards the issue of the third-party notice as analogous to the issue of the writ. Then, of course, the counterclaim by the third party is analogous to the counterclaim by the defendant. It really does, therefore, seem to reduce the proposition, which under sub-s. 2 I should have thought probably right, to an absurdity, because—to take this particular case as an example—it might well be that it would be impossible for the insurer to give a notice to Mr. Cross in the time which is provided in the proviso. Supposing that the insurer had begun his action within three months after the commencement of the proceedings in the sense of the issue of the third-party notice, it would not follow that he would be in a position to give the requisite notice. Great stress has properly been laid on these words in the proviso: "to the person who is "the plaintiff in the said proceedings." They are not very happily chosen words. It is necessary to construe them as meaning "the person who is making a claim in the said "proceedings, which results, or may result, in judgment "against the person insured." The proviso that, within seven days after the commencement of an action, notice

1938

Cross v. British Oak Insurance Co.

du Parcq J.

shall be given to the person who is the plaintiff in the proceedings, construed literally, is absurd, because that would mean that the insurer who was proposing to repudiate the policy, when his insured issued a writ must at once inform him that he, the insurer, had obtained a declaration that he was entitled to repudiate the policy, which, of course, the plaintiff would know perfectly well already.

The words must be read to include "the defendant who "counterclaims." That view, to which one is forced, seems to me to strengthen the argument that the proceedings are taken to be commenced by the counterclaim, because the Legislature so clearly regarded the person who makes the relevant claim as commencing the proceedings that they actually call him the plaintiff, although technically he may not be the plaintiff at all, but a defendant counterclaiming.

It seems to me, therefore, that sub-s. 3 gives the strongest indication that "the proceedings in which the judgment "was given" means "the proceedings begun by a person "who may for this purpose be regarded as a plaintiff, "who makes a claim which results in the judgment upon "which reliance is placed against the insurers." If that is right, the plaintiff here cannot succeed on the major part of his claim.

There is the further question whether the plaintiff can succeed so far as concerns the costs that Fowler became liable to pay as a result of the third-party proceedings, and not the counterclaim, because a notice was given to the insurance company with regard to the third-party notice. I think that the answer to that is that under the policy Fowler had no claim against the insurance company in respect of that.

The result is that, though I do not think the matter is entirely free from doubt, I think it is reasonably clear that, in the absence of any notice to the insurance company that Mr. Cross was making a claim, the insurance company have a good answer, or to put it more accurately, the plaintiff has not established the facts which he must establish in order to succeed against them. Within the meaning of

s. 10 the proceedings in which the judgment was given were commenced, in my view, when Cross counterclaimed, and not before, and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *Emmet & Co., for Wragge & Co., Birmingham.*

Solicitors for the defendants: *L. Bingham & Co.*

T. W. M.

Discussed. BOGUSLAWSKI *v.* GDYNIA AMERYKA LINE [1951] 1 K. B. 162

C. A.

1938
Feb. 22, 23, 24, 25, 28; *March* 17.

BANCO DE BILBAO *v.* SANCHA.

[1937. B. No. 1081.]

SAME *v.* REY.

[1937. B. No. 1084.]

International law—De facto government over part of foreign country—Rival government claiming jurisdiction over whole country—Recognition by British Government of the two governments as de facto government and de jure government respectively—Validity of acts of the two governments—Principal and agent—Power of attorney—Bank—Appointment of new board of directors—Claim to possession of London branch.

The Courts of this country are bound to treat the acts of a government, which His Majesty's Government recognizes as the de facto government of a certain area in a foreign country, as acts which cannot be impugned as being the acts of an usurping government, and the Courts are bound to treat the acts of a rival government claiming jurisdiction over the same area, even though the latter government is recognized by His Majesty's Government as the de jure government of the whole country, as a mere nullity in that area.

The plaintiff bank was a company constituted under the laws of Spain having its corporate home at Bilbao. It had a branch in London, of which the two defendants were the managers. Until 1937 the affairs of the bank were conducted by a board of directors elected by the shareholders in accordance with the articles regulating the bank. On October 6, 1936, the Basque country, in which Bilbao is situated, was constituted an autonomous State within the Spanish State. On December 23, 1936, the Basque autonomous State made a decree under which, by an order dated January 5, 1937, a new board was appointed for the plaintiff bank in substitution for the existing board. The new board desired to obtain control of the London branch, and accordingly purported to determine the power of the two defendants as agents for the bank and appointed a new manager. The two defendants, however, refused to hand over the branch to the new manager. Two actions were thereupon brought in the name of the bank to restrain the two defendants from continuing in control of the London branch and its assets. Lewis J., on June 4, 1937, held that according to the law of Spain the decrees of the Basque government were ineffective, and that consequently the new board set up by the order of January 5, 1937, had no legal right to act as the board of the company, and that therefore the new manager had no mandate from the company. He accordingly gave judgment for the two defendants. The plaintiff bank appealed. Meanwhile the insurgents under General Franco had been approaching Bilbao, and on June 15, 1937, the new board left the office of the bank at Bilbao, and removed the bank's documents ultimately to Barcelona. On June 19, 1937, Bilbao was occupied by the insurgent forces under General Franco. It appeared from a letter written by the Foreign Office on February 17, 1938, that the government set up by General Franco in the Basque country after the capture of Bilbao was recognized by the British Government as being the government which exercised de facto administrative control over the Basque country, including Bilbao. At the same time the British Government recognized the Republican Government of Spain as the de jure government of the whole of Spain, including the area over which it recognized General Franco's Government as exercising de facto administrative control. On August 22, 1937, the President of the Spanish Republic made a decree that the registered office of all companies which had been established in the Basque country should be deemed to be transferred to either Valencia or Barcelona. On September 30, 1937, the President made a decree validating all the decrees of the Basque Government which Lewis J. had declared invalid. This decree was subsequently ratified by the Cortes:—

Held, by the Court of Appeal, that the question as to what body of directors had the legal right to represent the plaintiff bank must depend upon the articles under which it was constituted, and that the construction of those articles must be governed by the law from time to time prevailing at the place where the corporate home was set up, and that must be the law of the government recognized by the British Government as being the de facto government of the territory in which Bilbao was situated, and that the laws purporting to affect the plaintiff bank, which had been made by the Republican Government of Spain at a time when it was no longer in de facto control of the Basque territory, must be disregarded.

Judgment of Lewis J. affirmed.

Aksionairnoye Obschestvo A. M. Luther v. *James Sagor & Co.* [1921] 3 K. B. 532; *White, Child, & Beney, Ld.* v. *Eagle Star and British Dominions Insurance Co.* (1922) 127 L. T. 571; and *Bank of Ethiopia* v. *National Bank of Egypt* [1937] Ch. 513 applied and followed.

APPEALS from a decision of Lewis J.

The defendant Luis Sancha y Lengo was formerly the secretary of the London branch of the plaintiff bank, the Banco de Bilbao; the defendant Antonio Rey y Zardoya was formerly the accountant employed at the plaintiff bank's London branch. The two defendants had control of and claimed power to act for and on behalf of the plaintiff bank in London.

One Pedro Albisu y Urruzuno alleged in an affidavit that he was the duly accredited representative of the plaintiff bank in London, and that he was the plaintiff bank's attorney having power to take charge of and to control all the property and affairs of the plaintiff bank's London branch at Bilbao House, New Broad Street. He alleged that the appointment of the defendant Sancha as secretary and the appointment of the defendant Rey as accountant, and all their powers to act for and on behalf of the plaintiff bank or to give instructions in its name or on its behalf were determined by the plaintiff bank's Board of Control at its head office in Bilbao on March 5, 1937, and that the two defendants were duly notified thereof on or about March 12, 1937, but that the two defendants had since that date nevertheless purported to continue to act as agents for the plaintiff bank.

Albisu said that pursuant to his authority he attended at the premises of the plaintiff bank on March 18, 1937, and there demanded of the two defendants that they should deliver up the control of the plaintiff bank's London branch and its key, but that the two defendants refused to do so.

Actions were thereupon commenced, in the name of the Banco de Bilbao, against the two defendants, for delivery up by them of the plaintiffs' property wrongfully detained by the defendants, and for an injunction restraining the two defendants from removing or transferring out of the jurisdiction of the Court or dealing in any way with the property or the rights or the assets of the plaintiff bank, and from acting or purporting to act as the plaintiffs' agents either in the plaintiffs' name or otherwise and from holding themselves out as having the plaintiffs' authority so to act on the plaintiffs' behalf and from interfering in any way with the plaintiffs' affairs and from going upon the plaintiffs' premises at Bilbao House, New Broad Street, London, and from retaining in their possession, custody or control the plaintiffs' property or any of it of whatsoever nature or kind.

The following statement of facts is taken from the judgment of Clauson L.J.

The plaintiffs, the Banco de Bilbao, are a company constituted under the laws of Spain with its domicilio social or corporate home at Bilbao. For many years the bank has maintained a branch in London which, until the occurrences next to be related, was carried on by the defendants as managers.

Until the beginning of the year 1937 the affairs of the bank at its corporate home in Bilbao were conducted by a board of directors duly elected by the shareholders in accordance with the articles regulating the bank. It appears, however, that on October 3, 1936, the President of the Spanish Republic issued a decree having the effect of law directing the formation in all private banks (including as it would appear the Banco de Bilbao) of a directing committee consisting of a representative of the Treasury, a representative of the shareholders, a representative of the holders of current accounts, and a representative of the National Federation of Banking, as well as of such directors as " have complied with the duty of "affording collaboration to the Regime." No direct action was, as it would seem, at this time taken by the Spanish Government to reconstitute the board of the bank in accordance with this decree. But on October 6, 1936, a law came into force constituting the Basque country, in which Bilbao is situate, an autonomous region within the Spanish State. On December 23, 1936, a decree of the Government of the autonomous Basque State thus constituted was issued, amending the constitution of banks within their territory, which included the Banco de Bilbao, by substituting for each board of directors a board consisting of twelve persons, six to be selected by the Minister of Treasury from existing directors and shareholders, four to be appointed by the nomination of the trade unions of banking employees and two others; and on January 5, 1937, the Minister of Treasury by order constituted a new board in accordance with the last mentioned decree for the Banco de Bilbao. From January 5, 1937, the new board thus constituted took over control of the office of the bank in Bilbao.

The new board thus constituted was desirous of obtaining control of the London branch of the bank, and on March 18, 1937, one Pedro Albisu presented himself at the London branch and produced to the defendants certain notarial documents which it was suggested had the effect of superseding the authorities under which the defendants had for many years acted as managers of the London branch, and of vesting in Albisu powers to represent the bank in London and control the London branch. The defendants refused to hand over the branch to Albisu, and these actions were started on March 22, 1937, with the object of restraining the defendants from continuing in control of the London branch and of the assets of the bank in London. In due course arrangements were made for three issues to be settled, which were, in substance, whether Albisu was at the date at which he presented himself at the London branch, or at the date of the commencement of the action, attorney of the bank with power and authority to take charge of the London branch, and whether the respective defendants had like authority on the like dates. The issues came on for trial before Lewis J., and the questions which emerged were, first, whether the notarial documents produced by Albisu were proper and sufficient evidence of Albisu's authority to act in London on behalf of the bank, and, secondly, assuming that they were, whether as a matter of Spanish law the decrees of the Basque Government were valid to constitute the new board as the legal executive organ of the bank.

At the trial the main controversy was directed to the second question, and Lewis J. held as a fact that according to the law of Spain, and having regard in particular to certain provisions in the Spanish Constitution, the decrees of the Basque Government were ineffective for their purpose, with the consequence that the board set up by the order of January 5, 1937, had no legal right to act as the board of the company, and that Albisu, who admittedly derived his authority from the new board so set up, had accordingly no effective mandate from the company. On this ground the learned judge decided the issues against the plaintiff bank, and on June 4, 1937, gave judgment for the defendants in the two actions. On the first question the learned judge held that the notarial acts, which were the only evidence produced for the mandate to Albisu upon the existence of which the actions were founded, were sufficient evidence of a due delegation to Albisu from the new board of authority to act on behalf of the bank in London. But in view of his finding on the question of Spanish law, the learned judge's finding on this point of evidence was of course of no assistance to the plaintiff bank.

On June 10, 1937, the plaintiff bank appealed to this Court against the judgments of Lewis J., and immediately afterwards events proceeded to develop with startling rapidity. The civil war in Spain had been waging for many months and the insurgent forces by this time seem to have been in occupation of a considerable portion of the Basque territory and to have been threatening Bilbao. On June 15, 1937, the new board, whose sympathies were with the Government and not with the insurgents, left the office of the bank in Bilbao and removed the bank's documents and so forth away from the Basque territory, first to Santander, subsequently to Valencia, and ultimately to Barcelona. On June 19, 1937, Bilbao was occupied by the insurgent forces under General Franco.

It appears from a letter addressed to the solicitors in the case by the Foreign Office on February 17, 1938, that the Government set up by General Franco in the Basque country since his capture of Bilbao on June 19, 1937, is now recognized by His Majesty's Government as the Government which exercises de facto administrative control over a considerable portion of the Basque country, including Bilbao. There appears to be no dispute that control has been so exercised at Bilbao since June 19, 1937, and over the rest of the Basque province of Viscaya, in which Bilbao is situated, since about the end of August, 1937, while over most of the rest of the Basque country such control has been exercised since a period anterior to the capture of Bilbao by General Franco. It appears that notwithstanding recognition by His Majesty's Government of the de facto position of General Franco's Government in this area, His Majesty's Government recognises the Republican Government of Spain as the de jure Government of the whole of Spain including the area in which it recognizes General Franco's Government as exercising de facto administrative control.

C. A.
1938

Banco de Bilbao v. Sancha.
Same v. Rey.

The new board having left Bilbao, the Spanish Government, at a time when it had no de facto control over Bilbao or the surrounding Basque country, set about the enactment of legislation dealing with such banks, including in particular the Banco de Bilbao, as had their corporate homes (domicilio social) in Bilbao. That legislation was as follows. On August 22, 1937, the President of the Spanish Republic issued a decree in Valencia to the effect that the registered office (domicilio) of all companies which had been established in the Basque country should be deemed to be transferred to the towns of Valencia or Barcelona according as might be decided by the managing bodies of the undertakings; and on September 30, 1937, the President issued another decree, again from Valencia, the substance of which was to validate as from their respective dates the decrees of the Basque autonomous Government which Lewis J. in the present action had held to be ineffective in Spanish law. The decree contained a further clause to the effect that the contracts or acts carried out by agencies or branches in Spain or abroad of the banks should be void when the person carrying them out fails to comply strictly with the powers, directions or decisions of the organs of legitimate representation of the bank which should be constituted on the basis of the enactments of the Government of the Republic; and it would appear from a decree of the President dated at Valencia on October 21, 1937, that the Presidential decrees already mentioned were confirmed and made legal by the Cortes as the legislative organ of the Government of the Spanish Republic; and on December 24, 1937, a further Presidential decree was issued from Valencia which is said subsequently to have been ratified by the Cortes declaring null and void all meetings of shareholders or of any other organs of administration of mercantile companies and concerns of all types when held outside the national territory under the legal Government of the Republic.

It is material to note that all these legislative acts of the Republican Government of Spain in so far as they are relevant to the present proceedings are dealing with companies having their corporate home within a territory which at the respective dates was under the administrative control of General Franco's Government recognized by His Majesty's Government as being the de facto Government of the area in question.

To make the story complete, although the facts to be mentioned are probably not strictly material for the purposes of the present proceedings, it is desirable to state that on December 27, 1937, a meeting of shareholders of the Banco de Bilbao took place at Bilbao, convened as it would seem by the original board which had been dispossessed by the Basque autonomous Government in favour of the new board early in the year 1937, at which comprehensive resolutions were passed repudiating the authority of the solicitors who instructed counsel appearing in the present proceedings for the Banco de Bilbao, and ratifying and confirming the authority of the defendants in these actions to represent the bank in London. Two days afterwards the de facto Government of General Franco in Bilbao issued a decree the purport of which, to put it shortly, was to nullify any change in the legal domicile of such a company as the Banco de Bilbao made since July 18, 1936, and to nullify any proceedings by the Spanish Republican Government directed against the Board of the Banco de Bilbao as it stood before July 18, 1936. The decree was to operate retroactively as from July 18, 1936.

A. T. Miller K.C. and *de Ferrars* for the appellants. Having regard to the new evidence adduced before this Court as to the decrees of the Spanish Government made since the judgment of Lewis J., by which the Spanish Republican Government purported to validate all the acts of the Basque Government, the judgment of Lewis J. cannot stand. There is no ground for saying that any government other than the Spanish Republican Government was legally controlling the Banco de Bilbao. That government had passed special legislation controlling the activities of the bank and that special legislation is binding upon the bank. The Basque Government appointed a new board to control the bank and that board were in control at Bilbao until shortly before the capture of Bilbao by General Franco. On the fall of Bilbao

C. A.
1938

Banco de Bilbao v. Sancha.
Same v. Rey.

the control of the bank ceased to operate from Bilbao because the records of the bank were removed first to Santander and afterwards to Valencia and then to Barcelona. The notion that the domicil of the bank was at Bilbao because the head office of the bank was there is very artificial, it is much more important to consider where the effective control of the bank was being administered. The new board sitting at Barcelona control a great part of the bank's activities and are the de jure board. The questions whether a corporation can have two domicils and where it has its residence are discussed in Foote's Private International Law, 5th ed., pp. 173–184. It is stated, on p. 178, that " the domicil of a corporation is "in fact where ' the brain which controls the operations of "' the company is situate '." In the present case the brains of the bank have moved from Bilbao to Barcelona and control the activities of the bank from there. The fact that General Franco is now in control of Bilbao is no ground for saying that his decrees are the law governing the bank, because the Spanish Republican Government still control the greater part of the bank's activities. The Spanish Republican Government made a decree that the decrees made by General Franco in territory under his control are ineffective. There is a great difference between the de facto control of General Franco's Government and the de facto control recognized in the cases with regard to Russia. After the Bolshevik revolution the de jure government did not remain in any part of Russia and the British Government recognized the Soviet Government as being the de facto government over the whole of Russia—see *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1)—whereas in the present case there are two competing governments, the de jure National Government, which are also in de facto control over a large part of Spain, and the de facto government of General Franco. The acts of a de facto government ought to be confined to property which must necessarily be controlled by them. The recognition of a de facto government only rests upon necessity, and, if the necessity cannot be proved to arise, then the acts of the de facto

(1) [1921] 3 K. B. 532.

government can be ignored. If the decrees of the de facto government purport to affect the acts of the de jure government, they will have no effect. The acts of the de facto government are confined to the territory which it controls. The basis of the judgment in *Luther* v. *Sagor* (1) was that there was only one sovereign government in Russia and that government claimed the property in dispute as being their property. The title to that property had passed to the de facto government and that government was not prejudiced by the existence of any de jure government. One of the questions which were put to the Secretary for Foreign Affairs and his answer thereto is inadmissible because it relates to facts which ought to have been proved by evidence. The principle upon which a letter from the Secretary of State as to the status of a foreign sovereign is admissible was stated by Lord Esher M.R. in *Mighell* v. *Sultan of Johore* (2) when he said: "when once there is the authoritative certificate of the "Queen through her minister of state as to the status of "another sovereign, that in the Courts of this country is "decisive." But the letter of the Secretary of State is not conclusive, or even admissible, as to facts which are provable by evidence. According to the answers of the Secretary of State for Foreign Affairs the Basque provinces are part of Spain over which no government other than the Spanish Republican Government has any de jure right. *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (3) is distinguishable because although the Foreign Office recognized the Emperor Haile Selassie as being the de jure government of Abyssinia, yet he had fled the country and Italy was the only government exercising de facto authority over the whole of Abyssinia and was so recognised by the British Government, and the Bank of Ethiopia had been validly dissolved by a decree of the Italian Government. In the present case there is control by the de jure government over the whole of Spain and de facto control over a great part of the area in which the activities of the bank are carried on. Although General

(1) [1921] 3 K. B. 532.
(2) [1894] 1 Q. B. 149, 158.
(3) [1937] 1 Ch. 513.

C. A.
1938

Banco de Bilbao v. Sancha.
Same v. Rey.

Franco's government has de facto authority over the Basque provinces there cannot be two sovereign states over the same area, and therefore General Franco's decrees have no de jure validity and only the legislation of the de jure government over the territory in question will be recognized in these Courts. The " siège social " of the bank was at Barcelona ever since the de jure government made a law decreeing that the head office of the company should be at Barcelona. Effect ought to be given to the legislation of the sovereign state which ratified the appointment of the new board of the bank and which moved the registered office of the company to Barcelona. The decision in *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ld.* (1), strongly supports the argument in the present case. It was there held by the Court of Appeal that a company incorporated under the laws of Belgium and which had its registered office at Antwerp was incorporated not in Antwerp but in Belgium, and was therefore not incorporated in an enemy country, for although a large part of the country was in the effective military occupation of an enemy, yet the country as a whole was not territory in hostile occupation. In like manner the bank in this case was incorporated in Spain, and until the whole of Spain is in the occupation of General Franco, the laws that ought to be applied in this case are the laws made by the Spanish Republican Government and not the laws that have been made in a part of Spain by General Franco.

[Clauson L.J. The exact point decided in the Belgian case was the construction of the Proclamation of September 9, 1914, which contained these words: " In the case of incor-"porated bodies, enemy character attaches only to those "incorporated in an enemy country."]

The law that now applies to this bank is not the law of the " siège social " but the law of the country under which it was incorporated. The company must be regarded as being subject not to the laws in operation at Bilbao, but to the laws of Spain.

Sir Patrick Hastings K.C., *Valentine Holmes* and *Helenus*

(1) [1915] 2 Ch. 409.

Milmo for the respondents. The new legislation passed by the National Government of Spain after the decision of Lewis J. with reference to the Banco de Bilbao is ad hoc legislation. The domicil of the company is, under its articles, in Bilbao, and the company has never changed its domicil, unless the new legislation has had the effect of forcibly changing the domicil of the company. The effect of the new legislation is to take away from the company every right of volition which the members of the company previously had. The new legislation is (1.) penal legislation, (2.) political legislation, and (3.) confiscatory legislation. The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly of a penal, revenue, or political law of a foreign State: see Dicey's Conflict of Laws, 5th ed., p. 212, rule 54. Mr. Dicey defines a "penal law" at p. 213 as being "a law which imposes punishment "for an offence against the State," and a "penal action" as being "a proceeding for the recovery, in favour of the State, "of a penalty due under a penal law." That definition is too narrow. The Court in *Wolff* v. *Oxholm* (1) considered the legal effect of the Danish Ordinance of Confiscation promulgated on August 16, 1807. Lord Ellenborough C.J. there said (2): "If this ordinance is to be considered merely as a penal law, "it is clear that the Courts of this country ought not to take "notice of it, because no country regards the penal laws of "another . . . . The penal laws of foreign countries are "strictly local, and affect nothing more than they can reach "and what can be seized by virtue of their authority." Lord Macnaghten in *Lecouturier* v. *Rey* (3) said: "But it is certainly "satisfactory to learn from the evidence of experts in French "law that the Law of Associations is a penal law—a law of "police and order—and is not considered to have any extra-"territorial effect." A Court will not give any effect to penal legislation if it is sought to give that legislation extra-territorial effect. The question as to the effect of confiscatory legislation of the Soviet Government and whether that legislation had extra-territorial effect was considered by the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (1) Lord Cave said (2) that the decrees of the Soviet Government must " be treated by the Courts of this "country as binding so far as the jurisdiction of the Russian "Government extends." Lord Finlay said (3): " Whatever "may be the effect of this decree in the territory under the "control of the Soviet Government, it appears to me that it "cannot be regarded as applicable to such branches as those "which were carrying on business in London and in Paris." Sargant L.J. in *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (4) referring to legislation or decrees of the Russian sovereign power which nationalized the undertaking and assets of the Rossia Insurance Company, said (5): "Effective as such legislation may be within the limits of "Russian territory, it cannot determine the ownership of "property locally situate in this country, such as debts "owing from debtors here." Maugham J. in *In re Russian Bank for Foreign Trade* (6) cited and relied upon the judgment of Sargant L.J. in *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd.* (4) In *The Jupiter* (*No.* 3) (7), where one of the questions was whether the decrees of the Russian Government transferred the property wherever situated, Hill J. said (8): " If *The Jupiter* was not within the territory "of the R. S. F. S. R. I do not see how the mere passing of a "decree could transfer the property." If the legislation of a foreign country is penal, political, or confiscatory it is local in its effect and can have no effect outside the territory of the country where it is made. Lord Sumner in *Duff Development Co.* v. *Kelantan Government* (9) said there was a presumption that " in the case of a new organization, which has de facto "broken away from an old State, still existing and still "recognised by His Majesty, the dominion of the old State "remains unimpaired until His Majesty is pleased to recognise

---

(1) (1817) 6 M. & S. 92.
(2) Ibid. 99.
(3) [1910] A. C. 262, 265.

---

(1) [1925] A. C. 112.
(2) Ibid. 123, 124.
(3) Ibid. 137.
(4) [1926] 1 K. B. 1.
(5) Ibid. 15.
(6) [1933] Ch. 745, 768.
(7) [1927] P. 122.
(8) Ibid. 144.
(9) [1924] A. C. 797, 825.

"the change." In the present case, however, His Majesty's Government has recognized General Franco's Government as being the de facto government of the Basque province in which Bilbao is situated. Chitty J. in *Republic of Peru* v. *Peruvian Guano Co.* (1) said: "But the Court is bound to "take cognizance of the recognition of a de facto government "by the government of this country, and it was admitted by "Plaintiffs' counsel at the bar that the de facto government "was duly recognised by the Queen. So soon as it is shewn "that a de facto government of a foreign state has been "recognised by the government of this country, no further "inquiry is permitted in a Court of Justice here. The Court "declines to investigate, and indeed has no proper means of "investigating, the title of the actual government of a foreign "state which has been thus recognised." Best C.J. in *Yrisarri* v. *Clement* (2) said that "If a foreign state is recog-"nised by this country, it is not necessary to prove, that it "is an existing state; but if it is not so recognised, such "proof becomes necessary . . . . I take the rule to be this— "if a body of persons assemble together to protect themselves, "and support their own independence, and make laws, and "have Courts of Justice, that is evidence of their being a state." If a portion of a State breaks away or falls into the hands of insurgents, in the Courts of this country the question whether that portion becomes an effective state depends upon whether it is recognized by the Government of this country as the de facto government of that portion of the old State. The Spanish Republican Government had no right to pass legislation taking away the rights to property outside their jurisdiction. They could not enforce their decrees in Bilbao, and they are now seeking to do in this country what they could not do in Bilbao. This case falls directly within the decision of Clauson J. in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (3), where he held that a decree by which the Italian Government purported to dissolve the Bank of Ethiopia was made by a de facto government having the

(1) (1887) 36 Ch. D. 489, 497.
(2) (1825) 2 C. & P. 223, 225.
(3) [1937] 1 Ch. 513.

occupied territory completely under its control and therefore under its full governmental authority. Clauson J. there held that the acts of a de facto government have the status of acts of a government with full responsibility. It was held in *The Jupiter* (*No.* 3) (1) and in *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (2) that the rights and property of a company situated outside Russia, were not effectively taken away by the Soviet legislation. As soon as the British Government recognized General Franco's Government as being the de facto government in the province Viscaya the jurisdiction of the Spanish Republican Government over that province ceased. The Banco de Bilbao is a company subject to the Mercantile Code of Spain having its domicil in the province of Viscaya and a government not exercising jurisdiction in Viscaya cannot pass decrees affecting the company.

The power of attorney under which the two defendants Rey and Sancha purported to act was admittedly valid. There is no evidence that Albisu has been given a power of attorney. No minute of his appointment has been produced. In order that everything must be presumed to have been done rightly it must be done in accordance with the bank's articles of association. There is no evidence that Albisu was appointed by any one to act as the bank's agent in London.

A. T. Miller K.C. in reply. The legislation of the Spanish Republican Government is neither penal, nor confiscatory nor political. This action is not a penal action, which is a proceeding for the recovery in favour of the State of a penalty due under a penal law. This is not penal legislation as it does not impose punishment for an offence against the State. Legislation which provides for the appointment of a new board of directors for the bank cannot be either penal or confiscatory. It is legislation within the province of any government to regulate the activities of persons, juridical or otherwise, within their jurisdiction. There is no such category as confiscatory legislation which the Courts of this country

(1) [1927] P. 122.

(2) [1926] 1 K. B. 1.

C. A.
1938

Banco de Bilbao v. Sancha. Same v. Rey.

will not enforce. Property confiscated in Russia under such legislation and exported to this country has been held to belong to the Russian Government. It is said that the Courts will not entertain an action for the enforcement of a political law of a foreign State, but in *Emperor of Austria* v. *Day and Kossuth* (1) it was held that although the Courts have no jurisdiction to restrain the commission of acts which only violated the political privileges of a foreign sovereign, yet the manufacture of notes intended to circulate in Hungary could be restrained as that was a wrong done to the foreign sovereign in respect of property belonging to that foreign sovereign. There is no authority for the proposition that a de jure government is limited with regard to its acts and laws to the territory over which it is also the de facto government. There is no case in which there has been a de facto government over a part of a country and at the same time a de jure government recognized by the British Government as being the de jure government over the whole of the country.

Cur. adv. vult.

1938. March 17. Greer L.J. In this case, after consultation between the three members of the Court (Greer, MacKinnon and Clauson L.JJ.), we found we were agreed. I accordingly asked Clauson L.J. to prepare the judgment of the Court. He has done so, and it will now be read by MacKinnon L.J.

Clauson L.J. This is an appeal from the judgments of Lewis J. in two actions, in each of which the Banco de Bilbao are plaintiffs, one Sancha being the defendant in one action, and one Rey being defendant in the other. On June 4, 1937, the learned judge gave judgment in each action for the defendant, and from those judgments the plaintiffs, the Banco de Bilbao, appeal to this Court.

Little or no argument has been addressed to this Court by the appellants in criticism of the reasoning or conclusions of the learned judge. The many days spent in argument have been directed almost entirely to a consideration of the legal effect of the various occurrences which have taken place since the date of the judgments in the action.

---

(1) (1861) 3 De G. F. & J. 217.

[His Lordship then stated the facts set out above and continued :] It is necessary to observe that the parties appear to have carried on the litigation in obliviousness of the principles laid down in the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), where their Lordships approved and adopted as good law the judgment of Warrington J. in *Richmond* v. *Branson & Son.* (2) Those principles may be summarized for the present purpose as follows : Where the answer to an action consists of a denial by the defendant that the action is really the action of the person or corporation whose name appears as plaintiff, and an assertion that the action is really the action of a person or body claiming without legal justification to represent the named plaintiff, this answer cannot be set up as a defence in the action : this answer must be set up by taking steps to satisfy the Court, before the action comes on for trial, that the truth is as the defendant alleges, and, if the defendant succeeds in so satisfying the Court, the result will be not that the defendant will succeed in defending the action, but that he will succeed in having the action struck out or stayed, the costs incurred being thrown not on the nominal plaintiff whose name has been wrongfully used, but on the solicitor who has taken upon himself to represent to the Court that he is retained by the proper organ or representative of the plaintiff to urge the plaintiff's suit before the Court. The principle having been laid down by the House of Lords, it is superfluous to justify it ; but the inconveniences of disregarding the principle are well illustrated by the present case. The disregard of the principle has resulted, as a matter of form, in a judgment being pronounced which technically appears to estop the plaintiff bank from setting up against their mere servants, the defendants, that the

(1) [1925] A. C. 112.

(2) [1914] 1 Ch. 968.

C. A.
1938

Banco de Bilbao
v.
Sancha.
Same
v.
Rey.

bank are, as they obviously must be, free as a matter of law to terminate at will their servants' agency. In this particular case there is, of course, no fear of the present defendants ever setting up such a point; but it is most undesirable that the records of the Court should be in such a form as to enable such a point to be plausibly set up. The fact is that where, as in the present case, the defendants are mere servants of their master, the bank, they can never have any just title to defend an action by their master, the bank, to enforce termination of their agency. The only case that the agent can possibly have must be, not that he has a defence to the action, but that the action is not the master's action at all, but the action of some one who poses as the master but is not really the master.

In this state of facts the appeal from Lewis J. comes before this Court. Counsel for the appellants, while seeking to reverse the orders made by Lewis J. in effect dismissing their actions, did not place before the Court any argument in support of the view that, as matters stood at the time that the learned judge dealt with the action, his finding of fact as to the invalidity according to Spanish law of the decrees of the Basque autonomous Government was otherwise than correct. They, however, asked for the reversal of this finding on the footing that the legislation of the Spanish Republican Government which had taken place at the dates stated above, subsequently to the fall of Bilbao on June 19, 1937, was effective to ratify the Basque Government decrees and make them good according to Spanish law, with the result that (assuming the sufficiency of the evidence before Lewis J. of the authority given by the new board to Mr. Albisu) Mr. Albisu would have to be treated as the authorized emissary of the new board as a legally constituted board, with the result that this action ought to succeed.

It is not necessary to pursue the interesting point whether a plaintiff whose action was quite properly dismissed at the date at which it came on for trial can in this Court properly claim reversal of that judgment in view of the occurrences since the date of the judgment. It may well be that such occurrences might in a proper case be taken into account so as to relieve an unsuccessful defendant from the continuing effects of relief granted against him, but there are obviously serious questions to be considered where it is sought to call in aid subsequent occurrences with a view to giving an unsuccessful plaintiff relief to which at the date of the trial of the action he was admittedly not entitled.

It will be observed, however, that if the principles already mentioned as having been laid down by the House of Lords had been regarded, the aspect of the matter would have been different. There would have been a motion to set aside the writ as having been issued without due authority and presumably the Court would so have held and the proceedings would have been struck out in the Court of first instance. The effect of the subsequent legislation, if (as the appellants contended before this Court) it had been valid and effective, would have enabled those who used the bank's name in the original action to issue a new writ in the bank's name which, on the same hypothesis, could not have been struck out, and to the new action (on the same hypothesis) the defendants would have had no defence. If, on the other hand, the true view were that the subsequent legislation was not valid and effective, the new action would have been struck out or stayed. At all events, the point would have had to be, and would have been, determined one way or the other.

This being the position, it would be merely academic to pursue the question as to the exact effect on a judgment of the Court of subsequent events in such a case as the present, and it seems best, without further considering difficulties of this nature, to face the question what the effect is on the position of affairs of this new legislation of the Spanish Republican Government.

The question what body of directors have the legal right of representing the Banco de Bilbao, a commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to

C. A.
1938

BANCO DE BILBAO
v.
SANCHA.
SAME
v.
REY.

the general law, must be governed by the lex loci contractus (see per Lord Wrenbury in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1)), i.e., by the law from time to time prevailing at the place where the corporate home (domicilio social) was set up. It seems clear that (for example) a law of the French legislature cannot have (at all events outside France) any operation in regard to the relations between an English company established in England under English law, and its shareholders on the one hand, and persons claiming as a board of directors to have control over the affairs of that company on the other. The question accordingly resolves itself into this: What is the Government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the government of the territory in which Bilbao is situate. Should the question arise as to what government must be recognized in this Court as the government of the territory in which Bilbao is situate, the question must, in case of doubt, be resolved by a statement made by His Majesty to this Court through the appropriate channel.

The propositions so far enunciated seem to be indisputable. The only question open to argument arises from the fact that His Majesty's Government recognize the Spanish Republican Government with its seat in Valencia or Barcelona as the de jure Government of the whole of Spain, but at the same time recognize the insurgent Government of General Franco as the Government de facto of the area in which Bilbao is situate. So far at all events as this Court is concerned this question seems to be settled by the principles laid down in decisions of this Court in *Luther* v. *Sagor* (2), and *White, Child & Beney, Ld.* v. *Eagle Star & British Dominions Insurance Co., Ld.* (3), which may be conveniently summarized, following in substance the language used in a Court of first instance, in the case of *Bank of Ethiopia* v. *National Bank of Egypt* (4), as follows—namely, that this Court is bound to treat the acts of the government which His Majesty's Government recognize as the de facto government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the de jure government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts.

---

(1) [1925] A. C. 112, 149.
(2) [1921] 3 K. B. 532.
(3) (1922) 127 L. T. 571.
(4) [1937] Ch. 513, 519, 522.

Thus in the Courts of this country no regard can be paid for the present purpose to the legislation enacted by the Republican Government which during the material period cannot be treated in this Court as the government of the area in which Bilbao is situated. In other words, it is not open to counsel for the plaintiffs to rely in this Court on the legislation on which alone their argument can be based.

It remains to mention a further point. As has already been stated, Lewis J. accepted certain notarial documents placed before him as sufficient evidence that Albisu was the duly authorized representative of the bank in so far as the new board could so appoint him. If the evidence was insufficient, the learned judge would have held that on that ground the action failed. After careful consideration of the notarial documents we cannot satisfy ourselves that they were admissible in evidence as proof of Albisu's authority. They amount merely to statements that a person who appeared before the notary alleged that the board of the bank had passed a resolution granting proper authority to Albisu, but no attempt was made to prove either by the production of the minute book or by the evidence of a person present on the occasion that any such resolution was passed, and if necessary we should have been prepared to hold on that ground alone that the plaintiffs did not prove the case which they set out to prove in the Court below.

The appeal thus fails. Notwithstanding the irregularity of the proceedings in the Court below, no purpose would be served by making any other order in this Court save an order dismissing the appeal.

C. A.
1938

Banco de Bilbao v. Sancha.
Same v. Rey.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *Petch & Co.*
Solicitors for respondents: *John Bailey & Co.*

R. F. S.

1938
Jan. 19.

TAYLOR *v.* TOWNEND.

Street trading—Sale of ice-cream from box-tricycle—Sale from stationary position—London County Council (General Powers) Act, 1927 (17 *&* 18 *Geo.* 5, *c. xxii.*), *s.* 30.

The appellant, riding a box-tricycle, patrolled certain streets five times a day offering for sale ice-cream, and at times halted for some twenty minutes at a school where he knew he should find, and did find, customers among the children. He did not hold a licence. He was charged and convicted of selling the ice-cream from a "receptacle occupying a stationary position" contrary to s. 30 of the London County Council (General Powers) Act, 1927.

The proviso to the section enacted that it should not apply to a person selling, etc., any article from any receptacle which he ordinarily moved from place to place in pursuit of and while conducting his trade:—

Held, that the proviso applied and that no offence had been committed.

Case stated by Kensington justices.

An information was preferred by the respondent, the town clerk of Fulham, against the appellant, Taylor, for that on a certain day in Fulham he unlawfully sold a certain article or thing, namely ice-cream, from a receptacle occupying a stationary position at a place in the carriage-way of a certain street without a licence, contrary to s. 30 of the London County Council (General Powers) Act, 1927 (17 & 18 Geo. 5, c. xxii.).

The receptacle was a tricycle carrying a box containing parcels of ice-cream, and the appellant, riding the machine, used to patrol certain streets four or five times a day offering for sale ice-cream, and, at certain times of the day when children were going into or coming out of school, to spend some time, in some cases twenty minutes, near the school, where he expected to find and found customers among the children.

The justices, being of opinion that the remaining of the tricycle in these circumstances in the same place for twenty minutes amounted to its occupying a stationary position within the meaning of s. 30 of the statute, convicted the appellant.

A proviso to s. 30 provides that "this section shall not "apply to any person selling or exposing or offering for "sale any article or thing from or upon any barrow cart "stall or other receptacle which he ordinarily moves from "place to place in pursuit of and while conducting his "trade."

Taylor appealed.

J. W. Morris K.C. and *Gilbert Woodward* for the appellant. The justices were wrong in convicting the appellant. It is submitted that the facts bring the case clearly within the proviso to s. 30 of the Act of 1927, but the justices seem to have paid no attention at all to its terms. The words in s. 30 "it shall not be lawful . . . . to sell . . . . "at a place" were inserted for the purpose of enabling a borough council, as it were, to license the place. None of the positions temporarily occupied by the appellant during his halts could be such "places." There is no finding in the case that the appellant was stationary at a place.

[He was stopped.]

Murphy K.C. and *Granville Sharp* for the respondent. The justices were right. A thing cannot be stationary except at a place. No doubt the two parts of s. 30 seem repugnant, but the material word is "stationary." It is obvious that one must construe that word within certain limits. On the one hand it cannot connote any element of permanency, while on the other it cannot apply to every case where the person riding on the vehicle stops. Between those limits it is submitted that the question is one of degree and fact, and the justices have made their findings on that question.

The words in the proviso would seem to apply to all vehicles, and what is to be considered is the purpose with which the vehicle is where it is found. Here it was for the purpose of selling.

[BRANSON J. In the one case business comes to a stationary vehicle, while in the other the vehicle goes in search of business.]

1938

TAYLOR
v.
TOWNEND.

Yes. And in the present case the cycle was habitually drawn up in front of the school.

[BRANSON J. What form of licence could this vehicle get ? Sect. 31, sub-s. 3 (*a*), of the Act says that the licence may prescribe the position or place in the street at which the licensee can sell. It fixes the spot.]

Here one has the case of being stationary at a spot where the appellant knows he can get custom. That place could be specified in the licence.

LORD HEWART C.J. This is a case stated by justices arising out of an information preferred by the respondent against the appellant for that on a certain day in Fulham he unlawfully sold a certain article or thing, namely ice-cream, from a receptacle occupying a stationary position, without having a licence. The justices found the charges proved and convicted under the Probation of Offenders Act, 1907. The question for us is whether in so doing they came to a correct determination in point of law.

There is no dispute as to the facts, which are simple and clear. The receptacle referred to was a tricycle, and it contained a box in which were portions of ice-cream, and what the person riding that tricycle and carrying that ice-cream did was to patrol certain streets four or five times a day and, at certain times of the day when children were going to or coming out of school, to spend a little time near the school, where he could find customers among the children. The justices came to the conclusion that that course of conduct brought the appellant within s. 30 of the Act of 1927. They said: "We were of the opinion that the contentions "of the respondent were correct, that in the circumstances "the remaining of the said box-tricycle in the same place "for twenty minutes amounted to its occupying a stationary " position within the meaning of s. 30."

It seems to me that, in expressing their opinion in that way, the justices were wrong. They seem to have thought that, in order to come within the mischief of this section, the receptacle needs only to be stationary—that it must be

1938

TAYLOR
v.
TOWNEND.

Lord Hewart
C.J.

something which can be said to be occupying a stationary position. That, I think, is a misreading of the section. The section is directed against persons who, without licence, sell or expose or offer for sale any article from a barrow, cart, stall or other receptacle occupying a stationary position. Then there comes a proviso. In my opinion the effect of the proviso is to except certain receptacles notwithstanding that at a particular time they do occupy for a time a stationary position. The question is: What is the nature of the matter they are engaged upon? The proviso is in these words. [His Lordship read it.] If the receptacle is one which the rider ordinarily moves from place to place in pursuit of or while conducting his trade, it seems to me that it matters not that for a reasonable time he remains stationary somewhere. If he did not occupy a stationary position somewhere this section would not apply to him at all.

It seems to me that these justices have paid too little, if any, attention to the words in the proviso "which he ordinarily moves from place to place in pursuit of and while "conducting his trade." Effect must be given to every one of those words, and I think that it would not be enough to protect a man who has a receptacle which is sometimes stationary if he merely moved it from place to place on some special occasion or for some extraordinary reason. But, if it is a normal part of his trade that he should remove that receptacle from place to place in pursuit of and while conducting his trade, then I think that he is protected. It seems to me that the justices here have almost wholly ignored the proviso to this section, and I think that, in these circumstances, their conclusion should have been that the offence charged was not committed. In my opinion, therefore, the appeal ought to be allowed.

BRANSON J. I agree. It appears to me, from the way in which the justices have stated their opinion, that they paid no attention to the proviso. In order to bring the case within the section at all, they have, as my Lord has pointed out, to find that the vehicle or receptacle occupied a stationary

1938

TAYLOR
v.
TOWNEND.

Branson J.

position. If they had not been satisfied of that, they would have had to dismiss the information upon that ground alone. It was argued before them that notwithstanding that the vehicle was in a stationary position, the conduct of the appellant was covered by the proviso to the section. It is with that point that they do not purport to deal. If they had found as a fact that he did not ordinarily move from place to place in pursuit of and while conducting his trade, different considerations would have applied, but they have not found that. They have simply ignored the proviso altogether. I agree entirely with what my Lord has said.

HUMPHREYS J. I have myself found considerable difficulty in coming to the conclusion that the proviso to this section was intended to authorize on occasions that which is prohibited in the first part of the section. The first half, as I understand it, is for the purpose of preventing trading from barrows, carts and such receptacles, by a stationary trader. In the proviso, to which I agree the justices appear to have paid no attention at all, something is allowed. It may be—and I gather that the other members of the Court think that this is what is allowed—that a person may at times trade from a stationary position in a street, if his ordinary method of trading is to trade from a movable and moved receptacle. It may be that that is so. I do not differ from the judgments which have been pronounced. I say merely that I have considerable difficulty, if that is so, in making sense of the section.

Appeal allowed.

Solicitors for appellant: *Joynson-Hicks & Co.*
Solicitor for respondent: *Wilfred Townend.*

W. L. L. B.

DANIELS *v.* VAUX.

1938
March 18.

Insurance—Motor-car—Third-party risks—Gift or loan of car by registered owner—Lapsed policy—Owner's liability to third party—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35.

In 1932 A., who was at all material times the registered owner of an M. G. car, lent or gave it to her son B., who used it as his own until March, 1934, when he negligently knocked down and injured C., a policeman on duty on the highway. At the time of the accident and to the knowledge of both A. and B. the policy of insurance for third-party risks which had been kept on foot by A. had expired, but before its expiration A. had informed both B. and the insurers that B. must in future pay the premiums himself. C. did not take proceedings against B., but there were negotiations between them for a settlement of C.'s claim, which were not concluded in November, 1936, when B. died:—

Held, in an action by C. against A., (1.) that B. was not the servant or agent of A. in driving the car; and (2.) that A. was not liable in damages for breach of the statutory duty to insure under the Road Traffic Act, 1930, s. 35; for an action could have been brought against B. in his lifetime, and judgment would have been satisfied out of B.'s assets, so that C. had suffered no damage in consequence of the breach.

Monk v. *Warbey* [1935] 1 K. B. 75 distinguished.

ACTION before Humphreys J. without a jury.

The plaintiff claimed damages due to the negligent driving of the servant or agent of the defendant, and, alternatively, damages for breach by the defendant of her statutory duty to insure under the Road Traffic Act, 1930, s. 35. The plaintiff was a police constable and on June 20, 1934, he was on duty directing the traffic at the cross-roads at Farnborough Green, in the county of Hampshire, when a motor-car driven by one Ernest Vaux, the son of the defendant, ran into him and caused him severe injuries. Negligence in driving the car was admitted and, had proceedings been taken against Ernest Vaux, there would have been no defence to the action. Negotiations between the respective solicitors as to a sum by way of payment in satisfaction of damages were proceeding in November, 1936, but on December 29, 1936, and before a writ had been issued by the plaintiff, Ernest Vaux died.

On January 11, 1937, the plaintiff commenced this action against the present defendant. The plaintiff's rights against the estate of Ernest Vaux were then barred by lapse of time. By her defence the defendant denied that she was the owner of the motor-car in question or that she had permitted her son to use it without insurance. As to this, the facts as found by the learned judge were that she had bought it in 1930 for the use of her four children, but in 1932, when her son Ernest Vaux was about to join his regiment, she had given or lent it to him. From that time forward he used the car, but she continued to register it in her name and to pay the expense of the motor licence and insurance premium.

Before June 14, 1934, however, when the policy was due to expire, she had informed her son, who had been involved in several motor accidents, and the insurers, that he must in future himself pay the insurance premium for the car. He had not done so and at the date of the accident the car was not covered by insurance.

In the course of the hearing the defendant by her counsel admitted for the purpose of the case that she was the owner of the car and she was therefore in a position to permit her son to use it. The plaintiff alleged that, in giving this permission when no policy was in force in relation to such user, she committed a breach of the duty imposed upon her by the Road Traffic Act, 1930, s. 35 (1): and, alternatively, that damage was caused by such breach of duty.

J. D. Cassels K.C., *T. Carthew K.C.*, and *N. R. Fox-Andrews* for plaintiff. The defendant was at all times registered owner of the car and paid for the licence. She permitted her son to use it and could have at any time withdrawn that permission. That is evidence that he was in law her servant or agent: *Barnard* v. *Sully*. (1) The true test is whether she had the right to control the person in actual charge, as is pointed out by Scrutton L.J. in *Parker* v. *Miller*. (2)

---

(1) Road Traffic Act, 1930, s. 35: "(1.) Subject to the provisions of "this Part of this Act, it shall not "be lawful for any person to use, "or to cause or permit any other "person to use, a motor vehicle "on a road unless there is in force "in relation to the user of the "vehicle by that person or that "other person, as the case may be, "such a policy of insurance or "such a security in respect of "third-party risks as complies "with the requirements of this "Part of this Act."

[Sub-s. 2 imposes penalties upon persons acting in contravention of the section.]

Secondly, the defendant is liable on the doctrine laid down by the Court of Appeal in *Monk* v. *Warbey*. (3) A personal right of action lies for breach of s. 35 of the Act of 1930, and the section is intended to give a third party some indemnity in the event of negligence by the person using the car. The defendant permitted her son to drive although not insured against third-party risks, and that gives the plaintiff a cause of action against her. The fact that the plaintiff did not exercise his right to sue the driver does not affect the present action. There is a concurrent remedy against the owner, whose breach of the statutory duty when she lent him the car has caused the loss.

Gilbert Beyfus K.C. and *Montague Berryman* for the defendant. The relationship of master and servant or of principal and agent did not exist here. The son had complete and independent control in driving the car and in the user of it. The facts here do not correspond with those in *Parker* v. *Miller*. (2) As regards the second ground of action the plaintiff has suffered no damage in consequence of the defendant's breach of duty. In *Monk* v. *Warbey* (3) the persons who were permitted by the owner to use the car in the absence of third-party insurance were persons without means, and in consequence nothing could be recovered from them. The gist of the decision is that the fact that s. 35 of the Road Traffic Act, 1930, is a penal section does not take away the civil remedy of the third party. The question remains in every case whether damage has resulted from the defendant's breach: for the mere fact of breach apart from other circumstances giving rise to liability cannot found a civil action. Here the plaintiff, if he had sued the son, or the son's personal representatives, would have recovered. The damage suffered by the plaintiff is due to the accident itself and not to the defendant's failure to take out the insurance policy. The plaintiff has no cause of action against Mrs. Vaux.

---

(1) (1931) 47 Times L. R. 557.
(2) (1926) 42 Times L. R. 408.
(3) [1935] 1 K. B. 75.

Carthew K.C. replied.

HUMPHREYS J. [after stating the facts and referring to the evidence, continued :] On this evidence counsel for the defendant has admitted—rightly as I think—that there was a bailment of the car from the defendant to her son, but not a legal transfer of ownership. She therefore comes within the Road Traffic Act, 1930, s. 35, in that she knowingly permitted him to use the car on the road when no policy of insurance was in force in relation to that user in respect of third-party risks. It was argued for the plaintiff that the damage which he had sustained was caused through the negligent driving of the defendant's servant or agent. It is well established that upon the bona fide loan of a car by A. to B., B. is not the servant or agent of A., and if B. has an accident A. is not liable upon this ground; but every case must of course depend upon its own facts. Thus in *Barnard* v. *Sully* (1) it was held that the mere fact of ownership of the car, in a case of negligent driving, was some evidence that whoever was driving it was doing so with the permission of the owner as his servant or agent. *Parker* v. *Miller* (2) was referred to as deciding that the question of agency is not to be determined by the test of physical control, but by the test of the right to control. Scrutton L.J. said in that case: "the test of agency in cases "of negligence has ever since *Quarman* v. *Bennett* (3) been not "physical control, but right of control." The facts in the present case were quite different. Here the defendant on March 10, 1932, handed over the car to her son saying "You "may have it," and he treated it and drove it as his own for more than two years. It is impossible in these

(1) 47 Times L. R. 557.

(2) 42 Times L. R. 408.

(3) (1840) 6 M. & W. 499.

circumstances to hold that he was driving it as her servant or agent. Both in fact and in law this ground of action fails.

As to the second ground of action, the question of civil liability for breach of statutory duty was carefully discussed by Greer L.J. in *Monk* v. *Warbey* (1), in which he laid down the following rule: "prima facie a person who has been "injured by the breach of a statute has a right to recover "damages from the person committing it, unless it can be "established by considering the whole of the Act that no "such right was intended to be given." I believe that to be the whole proposition decided in that case.

Greer L.J. went on to say that on the particular facts of the case it had been shown that the purpose of the Act was to enable a person who had been injured by the breach of that section to recover civil damages, as well as to make the person committing the breach liable to a penalty, and that on the facts of the case it appeared to him to be plain that the plaintiff had suffered damages as the direct result of the breach of the statutory duty. The facts of that case are very short. A person had lent his motor-car to two others, neither of whom was insured, and in circumstances in which the car became uninsured against third-party liability. The action was brought by a third party. There had been an accident while one of the two persons was driving it, and neither of them—against whom the action might have been brought by the plaintiff for damages which he suffered—was possessed of any means with which to pay any sum in respect of the damage sustained by the plaintiff. The result was that, if they had been insured as they ought to have been, and if there had been no breach of statutory duty, there would have been an insurance company which would have become liable to pay the damages awarded. The proper proceeding would have been to bring an action against the persons who had caused the damage, and they in turn would have had recourse to the insurance company, which would have paid the damages recoverable. As the direct result of the failure to insure the car not a

(1) [1935] 1 K. B. 75, 81, 85.

penny could be recovered. Damages to the plaintiff obviously arose from two things: first, from the negligence of the driver of the motor-car, and, secondly, from the failure to insure, which prevented the plaintiff from recovering the damages which he ought to have done. Maugham L.J. said in his very careful judgment in that case: "On the whole, "therefore, I have come to the conclusion that in this case "there is nothing in the Act to show that a personal action "is precluded by reason of the special remedy provided for a "breach; and further that there is sufficient ground for "coming to the conclusion that s. 35 was passed for the "purpose of giving a remedy to third persons who might "suffer injury by the negligence of the impecunious driver of "a car." It would be wrong, however, to hold that the plaintiff here can recover damages from the defendant for the admitted breach of her statutory duty irrespective of the question whether he has suffered damage as a result of the breach. I am quite unable to see how this breach of the statute has prevented the plaintiff from recovering damages which he would otherwise have got from some one else. He had a good cause of action against the son, who was the driver of the car, and if he had issued his writ within the limit of six months allowed by the Law Reform (Miscellaneous Provisions) Act, 1934, the writ would have survived against the personal representatives, but no writ was in fact issued before December 29, 1936.

It is right for me to say that no blame attaches to the plaintiff's solicitors for failure to take proceedings. The son's liability for the accident was not seriously disputed, and in December, 1936, his solicitors had come to the point of offering 1000*l.* by way of compensation. Negotiations on the question of amount were proceeding in December, 1936, when the young man was unfortunately killed, and by reason of the lapse of time the plaintiff was left without a remedy against the estate of the deceased. But that fact alone cannot be a reason for giving the plaintiff a remedy against some one else, and I have to consider whether he has suffered any damage as a result of this defendant's breach of her statutory duty. If the plaintiff had succeeded in an action brought against Mr. Vaux or his personal representatives, it is admitted that the damages would have been duly paid. It is not a case in which the negligent driver was insolvent, as in *Monk* v. *Warbey*. (1) In my view therefore I am bound to hold that the plaintiff has suffered no damage from the defendant's breach of statutory duty to insure.

Judgment for defendant.

Solicitors for plaintiff: *Coulson & Coulson, for Foster, Wells & Coggins, Aldershot.*

Solicitors for defendant: *Berrymans.*

(1) [1935] 1 K. B. 75.

F. P. F.

1938
Mar. 14, 23.

In re BUTLER.

CAMBERWELL (WINGFIELD MEWS) No. 2 CLEARANCE ORDER, 1936.

Local Government—Housing—Clearance order—" Houses "—" Other " buildings "—Dwelling accommodation over garages—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 25, 26, *Sch. III., para.* 2.

A local authority having resolved to declare a certain area a clearance area on the ground that the dwelling-houses were by reason of disrepair or sanitary defects unfit for human habitation . . . . and that the other buildings (if any) in the area were for a like reason dangerous or injurious to the health of the inhabitants, subsequently made a clearance order in respect of the area. The area consisted of two-storey buildings forming three sides of a cul-de-sac. The lower floor was used as garages, stables and workshops. The upper floor was divided into dwellings, though the divisions did not in all cases correspond with the divisions of the lower floor. There was a separate entrance in each case to the upper floor.

The Minister having confirmed the clearance order, the applicant, who was the mortgagee of the premises, appealed :—

Held, (1.) that the proper way to regard the premises was not to treat each composite structure consisting of garage or workshop with dwelling above as being either a " house " or an " other " building " within the meaning of the Housing Act, 1936, but to regard the dwellings as " houses " and the garages and shops as " other buildings."

In re Wilmot : *Hammersmith* (*Berghem Mews*) *Clearance Order* (1937) 157 L. T. 142 distinguished. Observations of the House of Lords in *Grant* v. *Langston* [1900] A. C. 383 applied.

(2.) That the effect of para. 2 of Sch. III. of the Housing Act, 1936, with the proviso, is that buildings included in a clearance area only as being dangerous or injurious to health by reason of bad arrangement, etc., are to be excluded from the clearance order unless the effect of such exclusion would be also to preserve from demolition a building " constructed or adapted as or for " the purposes of a dwelling, or partly for those purposes and " partly for other purposes, if any part (not being a part used " for other purposes) is by reason of disrepair or sanitary defects " unfit for human habitation."

(3.) Applying that test to the present case the ground floor premises would prima facie have been excluded from the order, but if they were so excluded, the provisions of the first part of para. 2 would be applied to a building (namely, the composite structure made up of workshop and dwelling) which fell within the proviso. The intention of the Legislature would be defeated if the word " building " in the proviso were limited to the " other " building " considered as a unit without reference to any larger structure of which it might form a part.

(4.) The resolution was not invalidated either by the reference to " other buildings (if any)," since the buildings were clearly identified in the schedule to the clearance order, or by a suspensive condition, there being evidence that that condition had been complied with.

APPLICATION under the Housing Act, 1936.

On January 15, 1936, the Council of the Metropolitan Borough of Camberwell resolved, " as respects an area "known as Wingfield Mews, that (subject to receiving a "communication from the London County Council that "they do not intend themselves to deal with the said area "as a clearance area or as part of a clearance area or to "no communication being received from them before the "expiration of two months), the Council with respect to "the said area, upon consideration of an official representation "dated January 2, 1936, by the Medical Officer of Health "of the borough, being satisfied: That the dwelling-houses "in the said area are by reason of disrepair or sanitary "defects, unfit for human habitation, or are, by reason of "their bad arrangement or the narrowness or bad arrangement "of the streets, dangerous or injurious to the health of the "inhabitants of the said area, and that the other buildings "(if any) in the said area are for a like reason dangerous or "injurious to the health of the said inhabitants, and that "the most satisfactory method of dealing with the conditions "in the said area is the demolition of all the buildings in "the area, and having caused the said area to be defined "and indicated by pink colour on a map entitled ' Map of "' the Camberwell (Wingfield Mews) Clearance Area ' in "such manner as to exclude from the said area any building "which is not unfit for human habitation or dangerous or "injurious to health; . . . . hereby declare the said area "to be a clearance area, that is to say, an area to be cleared "of all buildings in accordance with the provisions of s. 1

1938

BUTLER, *In re.* CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936.

"of the Housing Act, 1930" (now s. 25 of the Housing Act, 1936). (1)

On November 26, 1936, the Council made a clearance order in pursuance of the above resolution. The premises comprised in the area formed three sides of a cul-de-sac, and consisted of a number of buildings of two storeys, with garages and workshops on the ground floor, and dwellings separately occupied on the upper floor. In each case there was a separate entrance to the upper floor. The division between the adjoining dwellings did not always correspond with that between the workshops below.

---

(1) The Housing Act, 1936, s. 25, sub-s. 1 (replacing the Housing Act, 1930, s. 1, sub-s. 1, with the word "houses" for "dwelling-"houses" in para. (*a*), but otherwise verbatim): "Where a local "authority, upon consideration "of an official representation or "other information in their possession, are satisfied as respects any "area in their district—(*a*) that the "houses in that area are by reason "of disrepair or sanitary defects "unfit for human habitation, or "are by reason of their bad arrangement, or the narrowness or "bad arrangement of the streets, "dangerous or injurious to the "health of the inhabitants of the "area, and that the other buildings, if any, in the area are for a "like reason dangerous or injurious "to the health of the said inhabitants; and (*b*) that the most "satisfactory method of dealing "with the conditions in the area "is the demolition of all the "buildings in the area; the "authority shall cause that area "to be defined on a map in such "manner as to exclude from the "area any building which is not "unfit for human habitation or "dangerous or injurious to health "and shall pass a resolution "declaring the area so defined to "be a clearance area, that is to "say, an area to be cleared of all "buildings in accordance with the "subsequent provisions of this "part of this Act."

Sect. 26 provides for the making of "clearance orders" in respect of clearance areas, subject to confirmation by the Minister, and provides that the provisions of the Third Schedule to the Act shall have effect with respect to the making, submission and confirmation of a clearance order.

Sch. III., para. 2: "There shall "be excluded from the order any "houses or other buildings properly included in the clearance "area only on the ground that by "reason of their bad arrangement "in relation to other buildings, or "the narrowness or bad arrangement of the streets they are "dangerous or injurious to the "health of the inhabitants of the "area: Provided that the foregoing provisions of this paragraph shall not apply to a "building constructed or adapted "as, or for the purposes of, a "dwelling, or partly for those "purposes and partly for other "purposes, if any part (not being "a part used for other purposes) "is by reason of dis-repair or "sanitary defects unfit for human "habitation."

Sect. 188: "'Flat' means a "separate and self-contained set "of premises constructed for use "for the purposes of a dwelling "and forming part of a building "from some other part of which "it is divided horizontally. . . .

"'House' includes any yard, "garden, outhouses, and appurtenances belonging thereto or "usually enjoyed therewith."

The applicant, Mr. Alfred Warren Butler, as mortgagee of the premises in the area, objected, but the Minister, after holding a public inquiry, confirmed the order, and Mr. Butler made this application to the High Court, on the grounds that the order was not within the powers of the Housing Act, 1936, in that (*a*) none of the buildings or structures included in the order were " houses " within the meaning of the Act ; (*b*) in the order the buildings were not dealt with as " other buildings," but were described as " dwelling-house " and stable," etc. ; (*c*) in so far as the Camberwell Borough Council and the Minister of Health treated part of each of the said buildings as constituting a " house" within the meaning of the Act they acted ultra vires ; (*d*) in declaring the area to be a clearance area the Council acted ultra vires, because they could not declare an area comprising " other " buildings " only to be a clearance area.

Evershed K.C. and *H. A. Hill* for the applicant. There are two classes of edifice—to use a neutral term—within the Act, namely " houses " and " other buildings." "Houses " may be included in a clearance area for one of two reasons, that they are unfit for human habitation, or that by reason of bad arrangement, etc., they are dangerous or injurious to health. " Other buildings " can be included only for the latter reason. They cannot be unfit for habitation.

It is impossible to have a clearance area composed only of " other buildings." The local authority are in this dilemma, either these premises are " houses," or they are " other buildings." They cannot be both. The suggestion that they are " houses " breaks down on the facts. But if they are " other buildings " they cannot by themselves be made a clearance area. Nor was there here any official representation which could have

1938

BUTLER, *In re.* CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936.

founded the order as to other buildings. Moreover, as "other "buildings" they are within para. 2 of Sch. III., and should have been excluded from any clearance order.

As a secondary point, we rely also, if necessary, on the submission that a clearance order must be based on a valid resolution, and the resolution here was invalid for uncertainty, in that it referred to "other buildings (if any)." It was the duty of the council to be satisfied whether there were "other buildings" and to identify them. Moreover, the resolution was conditional, being prefaced by a suspensive clause. Whether it ever came into effect was left to depend on whether the London County Council notified or did not notify an intention to act with regard to this area.

Valentine Holmes for the Minister. This case is within the decision of Swift J. in *In re Wilmot; Hammersmith (Berghem Mews) Clearance Order* (1), where he held an almost exactly similar structure to be a "house." But if that case is distinguishable, it still does not follow that the buildings as a whole are "other buildings" and that the area consists of "other buildings" alone. The true way to regard it is that the ground floor may consist of "other buildings," but the first floor undoubtedly consists of "houses." That is not excluded by the fact that they may also be "flats" within the Act. If that view as to the composite nature of the buildings is correct, then the proviso to para. 2 of Sch. III. applies, since the ground floor "other buildings" cannot be excluded without also excluding a part of a building (namely, the composite two-storey edifice) constructed or adapted partly for the purposes of a dwelling and partly for other purposes, which part (not being a part used for other purposes) is by reason of disrepair or sanitary defects unfit for human habitation.

Cur. adv. vult.

1938. March 23. DU PARCQ J. read the following judgment. This is an application to quash the Camberwell

---

(1) (1937) 157 L. T. 142.

(Wingfield Mews) No. 2 Clearance Order, 1936, which was confirmed by the Minister of Health on September 8, 1937. The area to which the order applies may be described shortly as a cul-de-sac, the three sides of which are formed by a number of buildings of two storeys, with garages and workshops on the ground floor and dwellings, separately occupied, on the upper floor. There is, as the plan shows, a separate entrance in each case to the upper floor. The division between the adjoining dwellings does not always correspond with that between the workshops below.

The applicants say that it would be wrong to describe each garage or workshop, together with the dwelling or part of a dwelling immediately above it, as a " house " within the meaning of s. 25 of the Housing Act, 1936, or a " dwelling-"house " within the meaning of s. 1 of the Housing Act, 1930. I agree with this contention, and there is in this case no finding by the Minister of Health that each such composite structure is " a house." The present case is thus distinguishable from *In re Wilmot; Hammersmith* (*Berghem Mews*) *Clearance Order.* (1)

I am of opinion that it would be equally wrong to describe each composite structure as " another building," in contradistinction to a dwelling-house, within the above-mentioned sections. The question how the structures in the area are properly to be described is one of mixed law and fact. I have no doubt that the correct answer is that the dwellings above are " dwelling-houses " or " houses " and that the garages and workshops below are " other buildings." I am fully conscious of the danger of construing words in one Act of Parliament by reference to decisions of the Courts as to the meaning of those words in some other statute, but I think that my view is supported by certain observations made in the House of Lords in *Grant* v. *Langston.* (2) That case at least shows that there is nothing repugnant to good sense or contrary to legal canons of construction in the view which I am taking. Their Lordships were dealing with a structure of which the lower floor consisted of a public-house,

(1) 157 L. T. 142. (2) [1900] A. C. 383.

the upper floor of a dwelling. Subject to this immaterial difference in the facts, their language seems to me to be fairly applicable to the present case. Lord Halsbury L.C. said (1) "Sir George Jessel himself in *Yorkshire Fire and Life* "*Insurance* v. *Clayton* (2) said: 'In modern times a practice "'has grown up of putting separate houses one above the "'other; they are built in separate flats or houses'; but "for all legal and ordinary purposes they are separate houses. ". . . . It appears to me that in the language of Sir George "Jessel there are two houses built one above the other. I "suppose no one would dream of calling them one house if "the same conditions which are found to exist here were "found to exist in the same structures built side by side, "and not one above the other, and, if it is possible to have "one house built over another house, then all that has been "held to constitute a separate house exists here; there is "nothing which is held in common; the one structure is "superposed upon the other, and that is all." Lord Macnaghten said (3) that the two portions of the building were divided so completely that in fact they formed "separate houses," and Lord Brampton said (4): "One "roof covers the whole building, but each storey is so "structurally composed and arranged for permanent occupa"tion by a separate occupier that there is no internal "communication of any kind between the two storeys, nor "any common staircase or access to or from the street, or "from any part of the outside of the premises, each having "a separate entrance or entrances therefrom. In short, "it would be impossible to erect two separate houses under "one roof, or to divide one building into two distinct and "separate houses more completely than has been accomplished "in the building now under consideration. . . . In law I "think that each of these storeys constitutes a distinct and "separate house." I have not overlooked the definition of the word "flat" contained in s. 188, sub-s. 1 of the 1936 Act. I am not precluded, in my view, from giving the word

---

(1) [1900] A. C. 383, 392.

(2) (1881) 8 Q. B. D. 421.

(3) [1900] A. C. 383, 395.

(4) Ibid 399.

"house" one of its recognized meanings by reason of the fact that another and less general word is sometimes used in the Act and is given the same or a similar meaning.

I now have to deal with that part, and only that part, of Mr. Evershed's argument which is relevant on the assumption that the view which I have expressed is correct. His main contention was that upon that hypothesis the "other "buildings" must be excluded from the order by reason of para. 2 of the Third Schedule of the Act of 1936. I am of opinion, however, that the proviso in that paragraph operates to prevent such exclusion. Mr. Evershed would have me read the proviso as referring only to cases where the "house" or "other building" prima facie to be excluded under para. 2, considered as a separate entity, is "constructed or adapted as or for the purposes of a dwelling, "or partly for those purposes and partly for other purposes, "if any part (not being a part used for other purposes) is by "reason of dis-repair or sanitary defects unfit for human "habitation." I do not so read the proviso. Buildings are included in a clearance area either because they are (I.) unfit for human habitation for specified reasons, or because they are (2.) dangerous or injurious to health for specified reasons. The object of para. 2 of the Third Schedule is, in my opinion, to exclude buildings of the second class from the clearance order, thus exempting them from demolition, unless the effect of excluding a building of the second class would be also to preserve from demolition a building which, or part of which, is within the first class.

Applying the language of the paragraph to the facts of this case, I find that, but for the proviso, the ground floor premises would all be excluded from the order. But if they were so excluded, then the provisions of the first part of the paragraph would have been applied to "a building" (namely the building or structure made up of workshop and dwelling) which falls within the proviso. I think that the intention of the Legislature would be defeated if the word "building" in the proviso were read as necessarily meaning a building included in the clearance area as one of the second class, considered as a unit and without reference to any larger structure of which it may form a part. It is unnecessary for me now to decide whether the whole of Wingfield Mews should be regarded as one building within the meaning of the proviso, or should rather be treated for this purpose as being made up of a number of two-storeyed buildings. The result is the same on either view.

Mr. Evershed further argued that there was some imperfection in the order and in the proceedings which led to the making of the order. In my opinion this contention fails. When the statutory resolution was passed, the local authority felt some natural uncertainty as to the proper description of the buildings, but they guarded themselves by a reference, which was not misleading or ambiguous to anyone acquainted with the area, to " other buildings (if "any)." The schedule to the clearance order sufficiently identified the buildings to be demolished and no fault can be found with the order confirming it. Mr. Wrigley's affidavit proves that the Minister decided " that the upper floors of "the properties the subject matter of this appeal were, by "reason of disrepair or sanitary defects, unfit for human "habitation and that the whole of the said properties were, "by reason of their bad arrangement, dangerous or injurious "to the health of the inhabitants of the area." The Minister of Health, being in some doubt as to the legal effect of his finding of fact, has thus stated the facts found by him so that the Court may be in a position to draw the correct legal inference from them. I am satisfied that there was ample evidence before him to support his findings of fact, and he was in my opinion entitled, having so found, to confirm the order.

It only remains to deal with one minor point. Mr. Evershed submitted that the resolution of the local authority was bad because it was conditional in form. If due notice of this objection had been given to the Minister, I was told, and it was not disputed, that he would have been in a position to prove that what I may call the suspensive condition attached to the resolution was in fact fulfilled by a notice from the

London County Council such as the resolution contemplated. In the circumstances there is, in my judgment, nothing in this point.

1938

BUTLER, *In re.*
CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936.

The application is dismissed with costs.

Application dismissed.

Solicitors for the applicant: *Barnes & Butler.*
Solicitor for the respondent: *Solicitor, Ministry of Health.*

J. W. H.

C. A.
1937
Dec. 15, 16.

BRITISH SUGAR MANUFACTURERS, LIMITED *v.* HARRIS (INSPECTOR OF TAXES).

Revenue—Income Tax—Profits or gains of business—Agreement to pay 20 *per cent. of net profits for services rendered—Admissible deduction in computing profits for income tax purposes—Additional assessments—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D—Rules applicable to Cases I. and II., r.* 3 (*a*) *and* (*l*).

By an agreement dated May 18, 1926, a company, which was carrying on business as manufacturers of beet sugar, agreed to pay to two bodies in each of four years for division between them as they mutually agreed " 20 per cent. of the net profits " of the company in consideration of their giving to the company " the full benefit of their technical and financial knowledge and " experience and giving to the company and its directors advice " to the best of their ability respectively on all questions relating " to manufacture and finance and disposal of the company's " products " :—

Held (reversing the decision of Finlay J.), that in ascertaining the profits or gains of the company for any year assessable to income tax under Sch. D of the Income Tax Act, 1918, the sum payable to the two bodies under this agreement out of the earnings of the company should be allowed as a deduction as being " money wholly or exclusively laid out or expended for the " purposes of the trade " within r. 3 (*a*) of the Rules applicable to Cases I. and II.

Dictum of Lord Macmillan in *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras* [1931] L. R. 58 I. A. 239, 251 explained.

Indian Radio & Cable Communications Co. v. *Income-tax Commissioner, Bombay Presidency and Aden* [1937] 3 All E. R. 709, 713 applied.

Semble, that where an assessment has been made for purposes of income tax under Sch. D of the Income Tax Act, 1918, with full knowledge of the facts, and a certain deduction has been allowed in assessing the profits or gains, the mere fact that the Surveyor of Taxes afterwards changes his opinion as to the deduction having been properly allowed is not a ground for making an additional assessment under s. 125 of the Act.

APPEAL from a decision of Finlay J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on February 13, 1935, British

Sugar Manufacturers, Ld. (hereinafter called " the company ") appealed against an assessment made under Case I. of Sch. D of the Income Tax Acts, 1918, for the year 1931–2, in respect of the profits of its trade.

The company was incorporated on April 6, 1925, for the purpose of constructing and operating a beet sugar factory at Wissington, in the county of Norfolk. The original share capital of the company was 300,000*l.*, divided into 300,000 shares of 1*l.* each. This was increased on July 1, 1935, to 350,000*l.* Substantially the whole capital was issued and there was also an issue of 150,000*l.* debentures.

A company incorporated in Czechoslovakia, the title of which in English is " limited company formerly Skoda Works, " Plzen " (hereinafter referred to as " Skoda Works ") was allotted 46,500 shares in the company and acquired a further 68,062 shares in October, 1928. The company became indebted to Skoda Works in a considerable sum for machinery supplied.

Skoda Works, amongst its activities, was interested in the manufacture of beet sugar, and had special technical knowledge of the machinery necessary for the manufacture of beet sugar and of the conduct of the business generally. The process used by the company was a process in the working of which Skoda Works were experienced, and they supplied about 25 per cent. of the machinery used by the company when its factory was originally built. The debt for the machinery was not discharged out of the moneys payable under the contract below referred to.

British and Allied Investments Corporation, Ld. (hereinafter called " the corporation ") provided the company with office accommodation and staff from and after the date of the agreement below referred to, and generally supervised its affairs. The corporation held 2100 shares in the company.

The company at an early date in its history had got into difficulties, and on April 23, 1926, a receiver was appointed on behalf of the debenture holders.

There were disputes between the company and the Skoda Works and the Corporation as to the amounts owing by the company to these two bodies, and legal proceedings had been commenced against the company.

In order to re-establish the company's position, an agreement was entered into on May 18, 1926, between the company, Skoda Works and the corporation and certain other parties. Under this agreement the receiver for the debenture holders was to be discharged, and a settlement of the disputes mentioned above was arrived at. Skoda Works became the holders of additional shares in the company and also of a substantial block of debentures. Skoda Works (or in default the corporation) also agreed to subscribe or find subscribers for a further sum of 125,000*l.* debentures. Clause 11 of the agreement, which was the material clause for the purpose of this appeal, was as follows :—

"11. In each of the four years ending 31st March, 1927, "1928 and 1929 and 1930 Skoda Works and the corporation "will be entitled to receive between them and in such "proportions as they shall mutually agree upon 20 per cent. "of the net profits of the company in consideration of their "giving to the company the full benefit of their technical "and financial knowledge and experience and giving to the "company and its directors advice to the best of their ability "respectively on all questions of or relating to manufacture "and finance and disposal of the company's products Provided "that the company shall not by reason of this clause be liable "to pay any remuneration to the directors nominated by "Skoda Works beyond their fees as directors and their "travelling and other expenses. Such net profits shall be "arrived at after payment of all expenses of the company "and after providing for interest on the said debentures but "before making any provision for depreciation and in case "of any dispute as to the amount of such net profits the "certificate of the auditors for the time being of the company "shall be final and binding on all parties."

It was also provided in the agreement that certain directors of the company should resign and that two directors (of which one should be the chairman of directors) should be nominated by Skoda Works and one director should be nominated by the corporation. After necessary alterations of the articles of association to give effect to this provision, there were five directors of the company until October, 1928, from which date the three nominated directors were the directors of the company.

The sums paid under clause 11 of the agreement were in round figures :—

For the year to March, 1927, Nil (loss made by the company).
For the year to March, 1928, 6000*l.*
For the year to March, 1929, 6900*l.*
For the year to March, 1930, 11,600*l.*
For the year to March, 1931, 7400*l.*
For the year to March, 1932, 1000*l.*

In the year 1931 Skoda Works assisted the company in supplying drawings and advising as to the best manner in which to lay out certain extensions and improvements in the factory for the seasons 1931–32 costing a sum of about 15,000*l.*

In 1930 the question of the continuance of the payments to the Skoda Works was discussed between Mr. Carter and Dr. Loevenstein of the Skoda Works, and it was agreed that 20 per cent. of the profits should be paid to Skoda Works for the year to March 31, 1931, and that payment should be reduced to 12½ per cent. for the three subsequent years. Mr. Carter explained that the reduction was made because the company then required less assistance from Skoda Works, and also because the Government's subsidy to beet sugar manufacturers had been reduced.

In the accounts of the company for the year ended March 31, 1931, the profit and loss account showed a payment of 7412*l.* 12*s.* 2*d.* for management commission, and it was in respect of this payment that this appeal arose.

It was contended on behalf of the company :—

(1.) that the payment of 7412*l.* was a payment for services rendered by Skoda Works ;

(2.) that it was a sum expended in earning the company's profits and was not expended for capital purposes ;

(3.) that it was not a distribution of the company's profits ; and

C. A.
1937

British Sugar Manufacturers, Ld. *v.* Harris.

(4.) that in computing the company's profits the sum of 7412*l.* should be allowed as a deduction.

(5.) Alternatively, that if any part of the said payment was for capital purposes that part should be ascertained and the balance allowed as a deduction.

It was contended (inter alia) on behalf of the Crown :—

(1.) that the sum of 7412*l.* was not an expense in earning the company's profits ;

(2.) that it was in part expended for capital purposes ;

(3.) that the sum was a distribution of the company's profits ; and

(4.) that no deduction in respect of the said sum should be allowed in computing the profits for the purpose of assessment.

At the conclusion of the hearing, the Commissioners reserved their decision, but on March 7, 1935, gave the following decision :—

"The question we have to decide is whether the payment "made by the company under clause 11 of the agreement of "May 18, 1926, is a distribution of its profits or an expense "incurred in earning those profits.

"We were referred to numerous authorities, which are not "altogether easy to reconcile, but this case differs from any of "those to which we were referred, both in the wording of the "clause of the agreement under which the payment was made, "and in the fact that it was not merely a direct payment to "an individual for services rendered, but was a payment made "to two companies jointly, and was in part a payment for "services of a capital nature.

"We have come to the conclusion with some hesitation "that in the circumstances of this case we must hold that "the payment is a distribution of profits, and is not an "admissible deduction in computing the company's profits "for the purpose of assessment under Case I. of Schedule D."

They subsequently reduced the assessment to the figure agreed between the parties.

At a further meeting, held on February 26, 1936, the company appealed against additional assessments made upon it for the years 1928–29, 1929–30 and 1930–31, in respect of the profits of its business.

These assessments were made to cover (inter alia) the payments made under clause 11 of the agreement of May 18, 1926, by the company to Skoda Works in the respective basis years. These payments had been allowed as deductions, as being sums expended for the purposes of the trade, when the original assessments for the years under appeal were made.

It was not disputed that the material facts were before the Inspector of Taxes when the original assessments were made. When the company's accounts to March, 1931, were being considered with a view to assessment for the year 1931–1932, the Inspector of Taxes changed his view, and came to the conclusion in the autumn of 1932 that the payment made to Skoda Works in the basis year was not admissible as a deduction. The payment was therefore not allowed as a deduction in making the assessments for 1931–32, which was the subject of the earlier appeal to which this case relates.

The question of making additional assessments for the earlier years was discussed with the representatives of the company in March, 1933, but the making of the additional assessments was held in abeyance until a decision had been given on the appeal against the assessment for 1931–32. The additional assessments were in fact made in April or May, 1935.

No part of the payments made by the company in the years 1928, 1929 and 1930, were made for services of a capital nature rendered by Skoda Works.

It was contended on behalf of the company :—

(1.) that the payments in question were admissible as deductions on the contentions put forward in the previous appeal ; and

(2.) that the additional assessments were invalid, there having been no discovery by the Inspector of Taxes, to whom the material facts were known at the time when the original assessments were made.

The case of *Anderton & Halstead, Ld.* v. *Birrell* (1) was relied on.

---

(1) [1932] 1 K. B. 271 ; 16 Tax Cas. 200.

It was contended on behalf of the Crown :—

(1.) that the payments were not admissible as deductions ; and

(2.) that the Inspector of Taxes had discovered that the company had been undercharged in the original assessments, and that the additional assessments were valid.

The case of *Williams* v. *Grundy's Trustees* (1) was relied on.

The Commissioners held, with some doubt, that the case could not be distinguished from *Williams* v. *Grundy's Trustees* (1), and that they must follow that decision. They accordingly upheld the additional assessments in principle but reduced them to the amounts agreed between the parties.

Finlay J. said he had arrived at the conclusion, on the authorities as they stood, that he ought not to differ from the decision of the Special Commissioners, although if unfettered by authority he would have arrived at the contrary decision. He did not understand the Attorney-General to question the fact that if Skoda Works and the corporation had been remunerated by some fixed sum, that sum would have been a proper deduction from the profits of the company. Untrammelled by authority he would have said that here the 20 per cent. of the profits was truly remuneration for services done, and that the fact that it was to be 20 per cent. of the profits was really only to apply a measure to the remuneration.

Several of the authorities caused no difficulty. They started with *Last* v. *London Assurance Corporation* (2), and the decision of the majority of the House of Lords must be taken to be correct. He thought that case was distinguishable, but *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras* (3), presented a difficulty: that was a decision of the Privy Council. There was a sentence of Lord Macmillan, giving the decision of the Board, that was directly in point when he said : "A payment out of profits and conditional on profits "being earned cannot accurately be described as a payment

---

(1) [1934] 1 K. B. 524 ; 18 Tax Cas. 271.

(2) (1884) 10 App. Cas. 438.

(3) [1931] L. R. 58 I. A. 239, 251.

C. A.
1937

BRITISH SUGAR MANUFACTURERS, LD. *v.* HARRIS.

"made to earn profits." Lord Macmillan went on: "It "assumes that profits have first come into existence. But "profits on their coming into existence attract tax at that "point, and the revenue is not concerned with the subsequent "application of the profits." His attention was also called to *Union Cold Storage Co.* v. *Adamson* (1), where the matter decided was remote, but Lord Macmillan, referring to *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras* (2), said the facts there under consideration were entirely different, and that these cases all turned upon their particular circumstances. He (his Lordship) thought that the positions in the *Pondicherry* case (2) and the present case were fairly close. He confessed he had been rather shaken in his view by what was said by Lord Maugham in *Indian Radio & Cable Communications Co.* v. *Commissioner of Income-tax, Bombay Presidency and Aden.* (3) That decision of the Board did indicate that there might be cases in which it was possible to say that a share of profits paid by way of remuneration was, nevertheless, a sum to be deducted in arriving at the profits, and the apparent inconsistency which arose might be solved, as indeed it was solved by Lord Maugham, by saying that "profits" might be used in two different senses. He had, however, come to the conclusion that he ought not to hold that the deduction here claimed should be allowed.

There was a subsidiary point about which he would only say one word, because it was agreed that a decision of his own covered it—namely, *Williams* v. *Grundy's Trustees.* (4) He would follow that decision. The result was that the appeal from Special Commissioners must be dismissed.

The company appealed. The appeal was heard on December 15 and 16, 1937.

Cyril King K.C. and *F. Grant* for the appellant company. The sum paid to Skoda Works and the corporation in respect of the 20 per cent. of profits payable to them under the agreement of May 18, 1926, is a disbursement or expense

---

(1) (1931) 16 Tax Cas. 293.
(2) L. R. 58 I. A. 239.
(3) [1937] 3 All E. R. 709.
(4) [1934] 1 K. B. 524.

"wholly and exclusively laid out or expended for the purposes "of the trade" of the company, within r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918. It must, therefore, be deducted before arriving at the profits or gains of the company for income tax purposes. A special method of ascertaining the net profits of which 20 per cent. is to be paid to the two companies is laid down in the agreement, and they are not the profits for income tax purposes. The object of arriving at the first sum, called "net profits," is merely to provide a means of fixing the payment in any year to the two companies, and when ascertained it is a payment made exclusively for the purposes of the trade. The Income Tax Act, 1918, s. 209, sub-s. 1, provides that "In "arriving at the amount of profits or gains for the purpose "of income tax—(*a*) no other deductions shall be made than "such as are expressly enumerated in this Act," and sub-cl. (*b*) prohibits the deduction from profits of "any annual interest "or any annuity or other annual payment payable out of the "profits or gains": see also r. 3 (*l*) of the Rules applicable to Cases I. and II. The payment in question here is not such an annual payment, payable out of the profits or gains, as to which see *Alexandria Water Co.* v. *Musgrave* (1), and *Gresham Life Assurance Society* v. *Styles* (2), but falls within r. 3 (*a*). Part of the payments to Skoda Works were in respect of capital matters, but this makes no difference as the payment is one made out of profits or gains and must be deducted before ascertaining the taxable profits and gains.

Both the Commissioners and Finlay J. would have accepted the view that the expenditure here could be deducted but for what was said by Lord Macmillan in giving the judgment of the Privy Council in *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras.* (3) That is a case where the Pondicherry Railway Company was bound to pay over to the Colonial Government one half of the net profits. In negativing the contention that in paying this share of the net profits the railway company was making an expenditure incurred solely for the purpose of earning its own profit, Lord Macmillan said: "A payment "out of profits and conditional on profits being earned cannot "accurately be described as a payment made to earn profits." That statement was really too wide: see *Union Cold Storage Co.* v. *Adamson* (1), when Lord Macmillan explained this passage, and *Tata Hydro-Electric Agencies, Ld., Bombay* v. *Income-tax Commissioner, Bombay Presidency and Aden.* (2) In *Indian Radio & Cable Communications Co.* v. *Income-tax Commissioner, Bombay Presidency and Aden.* (3) Lord Maugham pointed out that an apparent difficulty was there caused by using the word "profits" in more than one sense, and he points out that "a contract to pay a commission at 10 per cent. on "the net profits of the year must necessarily be held to mean "on the net profits before the deduction of the commission." That is directly applicable here and is a complete answer to the Crown's claim in respect of all the years in question.

---

(1) (1883) 11 Q. B. D. 174.
(2) [1892] A. C. 309.
(3) L. R. 58 I. A. 239, 251.

The second contention relates only to the additional assessments for the years 1928-29, 1929-30 and 1930-31, in respect of the profits of the business, because the Surveyor of Taxes, after having allowed deductions of the sums paid to Skoda Works and the corporation, changed his mind and decided he had made a mistake in law. The question is whether this is a discovery within s. 125, sub-s. 1, of the Income Tax Act, 1918, so as to enable additional assessments to be made "at any time not later than six years after the expiration of the year of assessment": see s. 125, sub-s. 2, as amended by the Finance Act, 1923, s. 29. It is contended that Finlay J. was wrong in holding that when all the facts have been laid before the surveyor to enable him to make an original proper assessment, a change of opinion on a question of law in regard to those facts can be treated as a discovery: see *Rex* v. *Kensington Income Tax Commissioners. Ex parte Aramayo* (4); *Anderton & Halstead, Ld.* v. *Birrell* (5); and *Williams* v. *Grundy's Trustees.* (6) When a taxpayer has done all he can to get the position correctly dealt with and an assessment is made which

(1) 16 Tax Cas. 293, 331.
(2) [1937] A. C. 685.
(3) [1937] 3 All E. R. 709.
(4) (1913) 6 Tax Cas. 279.
(5) [1932] 1 K. B. 271.
(6) [1934] 1 K. B. 524.

C. A.
1937

British Sugar Manufacturers, Ld. v. Harris.

is not manifestly wrong, the taxpayer is entitled to have the assessment treated as final. The surveyor was familiar with the complexities of income tax law and could take advice if in doubt.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

In *Last* v. *London Assurance Corporation* (1) it was decided that bonuses to the participating policy holders were to be included in the calculation of profits assessable to income tax. The form of the arrangement is often very material: compare *A. W. Walker & Co.* v. *Inland Revenue Commissioners* (2), and *Union Cold Storage Co.* v. *Adamson.* (3)

The agreement here must be looked at as a whole. It is perfectly possible for a director to receive a share of profits, and then there would be no deduction from the profits for the purposes of income tax, though the opposite conclusion might be arrived at if a salary was paid with a commission superadded. So much depends on the form of the transaction. There could be no words more expressly providing for distribution of a share of net profits than in cl. 11 of the agreement. It makes no difference that there was a prescribed way of ascertaining the net profits. The same is true of the *Pondicherry* case. (4) The profit and loss account would show (1.) the takings; (2.) the expenses; (3.) the depreciation; and (4.) the deduction of 20 per cent. of the amount so arrived at. The *Pondicherry* case (4) is a strong authority in favour of the Crown, both on the facts and on the way Lord Macmillan decided it. This is a clear case of sharing profits, and the appeal must be dismissed.

It remains to deal with the second point, which turns on s. 125. The surveyor of taxes is not the person who makes the assessment. The proposed assessment has to be laid before the additional commissioners and it is only if they are satisfied with it that they direct an assessment to be made accordingly: see s. 121. Under sub-s. 7 the surveyor may make an objection in writing to the assessment being made by the additional commissioners and the matter then goes to the General

---

(1) 10 App. Cas. 438; 2 Tax Cas. 100.

(2) [1920] 3 K. B. 648.

(3) 16 Tax Cas. 293.

(4) L. R. 58 I. A. 239.

Commissioners. The case where a surveyor is precluded from making any further charge for the same year is laid down in s. 133, sub-s. 3. It is when the surveyor's objection to an assessment has been dealt with and determined on appeal. The words of s. 125, sub-s. 1, exactly cover the case in the reference to a deduction not authorized by the Income Tax Acts. There was a " discovery " of an undercharge. It is a misapprehension to say that the discovery of a new fact is necessary in order to make the section applicable. The appellants' case is that an opinion formed with a knowledge of all the facts creates an estoppel and prevents any one from imposing an additional assessment. There is no justification for this. Why should the Crown be precluded from making an additional assessment because the surveyor did not take an objection to an assessment which was available. In *Anderton & Halstead, Ld.* v. *Birrell* (1) no new facts were discovered.

[No reply was called for.]

SIR WILFRID GREENE M.R. The appellants in this case made an agreement on May 18, 1926, with a foreign company called " Skoda Works " and another company, an English company, called " British and Allied Investments Corporation Ld.," which in the agreement is called " the corporation." That agreement dealt with a certain financial re-organisation of the appellant company which had not prospered in its business and had become indebted to the Skoda Company. But I do not think it necessary to refer to any part of that agreement except one clause, because it appears to me that that clause is dealing with a particular subject-matter which does not require any reference to the other parts of the agreement. That clause is cl. 11, and it provides for the performance of certain services by the Skoda Company and the corporation to the respondents, and, as the whole question in this case upon the first point that arises turns upon the true view of the effect of that clause, I will read it. [His Lordship read the clause.]

Now the two companies concerned, the Skoda Company

---

(1) [1932] 1 K. B. 271.

C. A.
1937

British Sugar Manufacturers, Ld. v. Harris.

Sir Wilfrid Greene M.R.

and the corporation, performed services under that agreement. The precise manner in which the sum payable under it was divisible between them is not in my opinion a relevant matter, and I need not take up time with it. They performed services and they received sums from the company. The company claimed to be entitled, for the purposes of its assessment under Case I. of Sch. D, to treat the sums so paid, to quote the language of r. 3, para. (*a*), of the Rules applicable to Cases I. and II. as expenses "being money wholly and "exclusively laid out or expended for the purposes of the "trade."

The first matter that came before the Special Commissioners in connection with that claim related only to the year 1931–32, but, subject to the second point in the case, the decision with regard to that year governs the similar point raised by assessments in respect of the three previous years. There is one point in the case upon which no stress has been laid, but I mention it in order to get rid of it. There was a suggestion, and indeed there is a finding, that the payment in the year in question was " in part a payment for services of a capital "nature." That appears to be based on this, that in that year the Skoda Company assisted the appellants with their advice in connection with certain extensions of and improvements to the appellants' factory. No point was made on this, and it was not suggested on behalf of the Crown that any apportionment ought to be made, assuming that the appellants were right on their main contention. I therefore do not treat that matter as being of any importance, but, in saying that, I am not to be taken to assent to the proposition that the character of the work with regard to which the advice was given would prevent the rumuneration attributable to it from being a deductible expense. There is no need to go into that question.

Now the Special Commissioners with apparently some hesitation—in fact, they say " with some hesitation "—came to the conclusion that the sum was not a deductible sum because they held it to be a distribution of profits. Finlay J., against what was the inclination of his own mind, but conceiving himself to be constrained by authority, upheld the decision of the Special Commissioners. I have come to the conclusion that the view which Finlay J., but for the authorities, would clearly himself have taken is the right view. It appears to me that, when the true nature of this provision is appreciated, it is not possible to avoid the conclusion that it is an agreement for remuneration by way of a commission representing a percentage of profits for services to be rendered to the company; in other words, it is nothing more or less than a very common type of agreement under which officers of companies are remunerated by a commission on profits, which after all is nothing more than a share of profits, provided that the word "profits" is construed in the right sense. Some suggestion was made by the Attorney-General that the absence of a fixed salary in addition to commission affected the matter. I am unable to see that. I can see no reason at all in principle why a contract providing for remuneration by commission and nothing else should not produce the result that the sum payable under it to the employee is a proper deduction.

Now the matters to be observed in this case, I think, are, first of all, the nature of the work that is being done. The nature of the work that is being done is what one may succinctly describe as ordinary management work or ordinary advisory work in respect of technical matters. The next point to observe is that what is referred to as "net profits" is a figure to be arrived at upon a conventional basis, not the basis upon which the company would ascertain its profits for commercial purposes or the basis upon which it would ascertain its profits for income tax purposes, although, speaking for myself, I think that the latter consideration is not one of any importance. But it is an important factor to be considered (although I agree not necessarily in any individual case conclusive) that the fund of so-called profits, to 20 per cent. of which the companies are to be entitled for their services, is a fund ascertained by means of a conventional account between the parties.

Now bearing all those things in mind, the question arises: On which side of the line does the case fall? I quite accept

C. A.

1937

BRITISH SUGAR MANUFACTURERS, LD. *v.* HARRIS.

Sir Wilfrid Greene M.R.

the proposition that there is a line between a contract for payment of a share of profits simpliciter and a payment of remuneration which is deductible in truth before the profits divisible are ascertained, and that line in some cases may be very difficult to draw. The well-known case of *Last* v. *London Assurance Corporation* (1) is a very good example of that when the division of judicial opinion upon it is considered, but the reason why *Last's* case (1) fell upon the side of the line that it did appears, I think, from one passage in the judgment of Lord Blackburn. Lord Blackburn says this (2), speaking of the policy-holder: "If he dies before the quinquennial "period arrives he gets nothing; but if his policy is still in "force he has, I cannot but think, purchased a share in the "profits, if any, earned during those five years." Now that was what in *Last's* case (1) had happened. The policy-holder was treated as having purchased a share of profits. If a person purchases a share of profits, of course, the profits paid to that person cannot be deducted; that is quite obvious.

Now in the present case, there is nothing approaching a purchase of a share of profits in that sense. It is not cash that passes in exchange for these profits, it is services, and the badge of such a contract is remuneration for services, and, therefore, the first thing that this remuneration would certainly not be is a share of profits purchased by the employee. Again I quite accept the proposition that the mere circumstance by itself that services are rendered may not be conclusive. I can conceive of a case where a person contributes to some sort of joint adventure services, while others contribute perhaps capital, land, plant and goods, arranging between themselves (it may be something short of a partnership) that nobody shall get anything until the pool of profits is ascertained, and then they shall divide it up between them in specified proportions. That, it seems to me, would be a real agreement for division of profits, because there would be one profit fund only. There would not be two profit funds to be ascertained for different purposes. There would be one profit fund, and nobody would have any interest in anything until that profit

(1) 10 App. Cas. 438. (2) Ibid. 444.

fund was ascertained and fell to be divided, but, in the present case, that is not the fact. In the present case there are two funds of so-called profits which come into the picture. The first one is the fund which has to be ascertained for the purpose of calculating the 20 per cent. In that fund as such the persons entitled to the profits of this company—namely, the shareholders, have no concern. It is used for the purpose, and for the purpose only, of ascertaining what is to be paid to the Skoda Works and to the Corporation. Now, when that amount has been ascertained, that fund has ceased to have any usefulness at all, and it then becomes necessary to ascertain what are the divisible profits and, for that purpose, to take another account, and the account that is taken then would be an account which not only would bring in depreciation (or, as they did here, would bring out a figure expressed to be subject to depreciation), but would also take into account the sum that had been paid out to the Skoda Works and the Corporation upon the taking of the first account. It seems to me that the circumstance that those two accounts have to be made out throws a very clear light upon the real nature of this transaction, and, looking at the clause in question as a whole, it seems to me clear beyond any reasonable doubt that the agreement is merely an agreement under which, before ascertaining the divisible profits of this company at all, the Skoda Works and the Corporation are to receive upon a particular conventional basis a commission sum as remuneration for their services. When that has been said, it appears to me that it brings the case within a very familiar category.

Various authorities have been referred to. Speaking for myself, I find the greatest assistance from two passages, one of them is a passage in the judgment of Romer L.J. in this Court in the case of *Union Cold Storage Co.* v. *Adamson.* (1) What Romer L.J. says there (2) is that in order to succeed in that case the Crown would have had to establish the following proposition: "That where a company, for the purpose of "enabling it to carry on its trade and earn profits in its trade, "places itself under an obligation to make money payments,

---

(1) 16 Tax Cas. 293.

(2) Ibid. 328.

C. A.
1937

British Sugar Manufacturers, Ld. v. Harris.

Sir Wilfrid Greene M.R.

"the amount of which is dependent upon the profits earned, "or the payment of which is contingent upon certain profits "being earned, payments made in discharge of that obligation "are payments made out of the profits or gains of the company, "within the meaning of Rule 3 (*l*). In my opinion, for that "proposition there is no foundation at all in principle or on "authority." The case that was being dealt with there was a case where the obligation to make the payment was dependent upon the profits earned, but it seems to me that the reasoning and the expressions of Romer L.J. equally apply to the case where the payment to be made is a commission or a percentage of profits earned.

The other passage is a passage in the judgment of the Privy Council delivered by Lord Maugham in the case of *Indian Radio and Cable Communications Co.* v. *Income-tax Commissioner, Bombay Presidency and Aden.* (1) That was a case into the facts of which I need not go, but it is important as containing a reference to the particular phrase in an earlier case which affected the mind of Finlay J. in the present case. That case having been brought to the attention of the Board in the *Indian Radio* case (1), Lord Maugham said this (2): "It may be admitted that, as Mr. Latter contended, it is not "universally true to say that a payment, the making of which "is conditional on profits being earned, cannot properly be "described as an expenditure incurred for the purpose of "earning such profits. The typical exception is that of a "payment to a director or a manager of a commission on the "profits of a company. It may, however, be worth pointing "out that an apparent difficulty here is really caused by "using the word 'profits' in more than one sense. If a "company, having made an apparent net profit of 10,000*l*., "has then to pay 1000*l*. to directors or managers as the "contractual recompense for their services during the year, "it is plain that the real net profit is only 9000*l*. A contract "to pay a commission at 10 per cent. on the net profits of the "year must necessarily be held to mean on the net profits "before the deduction of the commission, that is, in the case

(1) [1937] 3 All E. R. 709. (2) Ibid. 713.

Sir Wilfrid Greene M.R.

"supposed, a commission on the 10,000*l.*" That passage, in my opinion, contains sufficient to dispose of this case, and if I may link it up, as I understand it, with what I said a moment ago about the two accounts, the two accounts are I think what may be called the accountancy aspect of the two different senses in which the word " profits " is used in these cases, as explained by Lord Maugham. Once you realize that as a matter of construction the word " profits " may be used in one sense for one purpose and in another sense for another purpose, I think you have the real solution of the difficulties that have arisen in this case.

The passage relied upon by Finlay J. which, against his own opinion, constrained him to decide as he did, was a passage in the judgment of the Privy Council delivered by Lord Macmillan in *Pondicherry Ry. Co.* v. *Income-tax Commissioner of Madras*. (1) The exact expression in the judgment was this: "A payment out of profits and conditional "on profits being earned cannot accurately be described as a "payment made to earn profits. It assumes that profits have "first come into existence. But profits on their coming into "existence attract tax at that point, and the revenue is not "concerned with the subsequent application of the profits." It is to be observed that Lord Macmillan in that paragraph was quite clearly using the word " profits " in one sense and one sense only; he was using it in the sense of the " real net "profit " to which Lord Maugham referred. That he was doing that is, I think, abundantly clear when the nature of the contract there in question is considered, which was merely a contract under which a percentage of profits was payable by the railway company to the French Government. There was no question of services or anything of that kind in the case; it was merely a sum payable out of profits. I do not find myself constrained by that expression of opinion, because it must be read, as Lord Macmillan has said, in a subsequent case in relation to the particular subject-matter with which he was dealing.

That disposes really of the whole appeal because precisely the same point arises on the other assessments. But there is a further point in regard to them on which I feel that I ought to express an opinion, as it was fully argued. It is this, that the three assessments in question——

---

(1) L. R. 58 I. A. 239, 251.

Sir Donald Somervell A.-G. asked leave to intervene and said: So far as the first part of your Lordship's judgment is concerned we should not have made any application for leave to appeal. So far as the second point is concerned we should have regarded it as a proper matter to ask your Lordship for leave to appeal and, of course, your Lordship could have decided that. You will appreciate the difficulties that might arise, supposing your Lordship thought it a right case for leave to appeal—if one went to the House of Lords and they said that this point did not really arise in view of your Lordship's finding on the first part of the case.

Their Lordships conferred.

SIR WILFRID GREENE M.R. Mr. King, I do not know whether you have any interest in this matter in view of what the Attorney-General has said?

Cyril King. My Lord, I feel that in view of what he has said, which means that the judgment will not be appealed against, that the second point is academic.

SIR WILFRID GREENE M.R. We all think in the circumstances that as the decision which I have given, with which the other members of the Court will, I understand, agree when they come to deliver their judgments, covers the whole matter, there is no necessity to deliver judgments on the second point. Of course, it will not be taken from that by anybody concerned that it means that we are necessarily in agreement with the decision of the Court below.

ROMER L.J. It will be observed by those interested in such matters that Mr. King was not called upon to reply upon that question; they will be able to form their own opinion, therefore, as to the views of this Court, without hearing the reasons why those views have been formed.

I agree with the judgment that has been delivered by the Master of the Rolls upon the first point. It appears to me that in all cases similar to the one with which we are dealing to-day the real question is: Is the payment that has to be made by the trader under the contract which is in question in truth a mere division of profits with another party or is it in truth a payment to the other party, the amount of which is ascertained by reference to the profits? Whether the particular case falls on one side of the line or the other is very often a question of extreme difficulty. How difficult it may be is apparent from the fact that in the case *Last* v. *London Assurance Corporation* (1) four learned judges were of opinion that the payment there fell on one side of the line and four learned judges were of opinion that it fell on the other. For myself in this case I can feel no doubt. A payment has to be made, the amount of which has to be ascertained by reference to certain profits of the company ascertained in a particular way. The payment is a payment necessary for the purpose of enabling the company or the trader to earn the profits of its trade and, therefore, it is a legitimate deduction from its profits when ascertained for the purpose of assessment under Sch. D. I think this conclusion is very much assisted by the consideration to which the Master of the Rolls has called attention, that in this case the payment is calculated by reference to profits which are not the profits which would be divisible between the company and anybody else with whom its profits might have to be divided. I agree, therefore, that this appeal should be allowed.

MacKinnon L.J. I agree. The rule says that in assessing the annual profits or gains no deduction shall be allowed or made for any annual payment—not any annual payment simpliciter, but any annual payment payable out of the profits or gains. The whole question in this, as in other cases, is, whether this, which is an annual payment, is an annual payment to be taken into account in order to ascertain the profits, or is an annual payment payable out of the profits

(1) 10 App. Cas. 438.

C. A.
1937

BRITISH SUGAR MANUFACTURERS, LD. *v.* HARRIS.

MacKinnon L.J.

after they have been ascertained. I think the true facts of this case are that it is of the former character. The difficulty in the case arises largely because of the necessary ambiguity in the word "profits," and the fact that in this agreement "profits" as a word does appear, but "profits," as I think, quite clearly of a different description from the annual profits or gains with which one is concerned in assessing the income tax. The ambiguity again arises and causes a difficulty in the passage that was quoted from Lord Macmillan's opinion in the Privy Council. (1) He said: "A payment out of profits "and conditional on profits being earned cannot accurately "be described as a payment made to earn profits." The word "profits" is used three times in that sentence, and means the same thing each time. The sentence therefore is a truism. But it would be equally a truism to say: "A payment "necessarily made in order to earn profits cannot properly "be described as a payment out of profits." In this case I think the annual payment was not an annual payment payable out of profits after they had been ascertained, but an annual payment to be taken into account in ascertaining what the annual profits were.

Appeal allowed.

Solicitors: *Godden, Holme & Ward; Solicitor of Inland Revenue.*

H. C. G.

---

(1) L. R. 58 I. A. 239, 251.

YUKON CONSOLIDATED GOLD CORPORATION, LIMITED *v.* CLARK.

K. B. D.
1937
March 22.
C. A.
1938
Jan. 18.

Judgments—Canada—Supreme Court of Ontario—Enforcement in United Kingdom—Registration—Administration of Justice Act, 1920 (10 & 11 *Geo.* 5, *c.* 81), *ss.* 9, 14—*Foreign Judgments* (*Reciprocal Enforcement*) *Act*, 1933 (23 *Geo.* 5, *c.* 13), *ss.* 1, 2, 6, 7—*Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions*) *Order in Council*, 1933 (*St. R.* & *O.* 1933, *No.* 1073).

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, provided by s. 7, sub-s. 1, that " His Majesty may by Order in " Council direct that this Part of this Act " [Part I., headed " Registration of Foreign Judgments "] " shall apply to His " Majesty's dominions outside the United Kingdom and to " judgments obtained in the courts of the said dominions as it " applies to foreign countries and judgments obtained in the courts " of foreign countries . . . , ."

An Order in Council was made on November 10, 1933, under that section applying Part I. of the Act of 1933 generally to His Majesty's Dominions outside the United Kingdom :—

Held, that, until an Order in Council had been made, extending Part I. of the Act of 1933 to a specific part of His Majesty's Dominions, reciting that reciprocal provisions had been made for the enforcement in that Dominion of judgments given in the superior Courts of the United Kingdom and specifying the Courts of that part of His Majesty's Dominion which shall be deemed to be superior Courts of that Dominion for the purposes of that Act, judgments obtained in that part of His Majesty's Dominions could not be registered, and consequently such judgments could be enforced by proceedings in the Courts of the United Kingdom for the recovery of the money payable under such judgments.

The defendant brought an action in the Courts of Ontario against the plaintiff company, in which action judgment was given for the plaintiff company with costs. Subsequently an action was brought by the plaintiff company against the defendant in the High Court in England to recover the amount of the costs.

No Order in Council had been made extending Part II. of the Administration of Justice Act, 1920, or Part I. of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to the Province of Ontario :—

Held, that the plaintiff company were not prevented by either the Act of 1920 or the Act of 1933 from bringing their action in the Courts of this country upon the judgment obtained in Ontario.

Judgment of MacKinnon J. affirmed.

APPEAL from a decision of MacKinnon J. on the trial of the action in the short cause list.

In 1935 the defendant, Clark, as trustee in the bankruptcy of one Welsdale, brought an action in the Supreme Court of Ontario against the Yukon Consolidated Gold Corporation, Ld., claiming that certain shares in the company belonged to the bankrupt, and that he was entitled to be registered in respect of them. Judgment was given in that action in favour of the company, and that judgment was affirmed by the Court of Appeal in Ontario.

The costs of those proceedings were duly taxed, and on January 20, 1937, the company issued a specially indorsed writ in this country against Clark for 1108*l.*, the balance of costs still due.

The defence set up by Clark was that by reason of the Administration of Justice Act, 1920, Part II., s. 9, sub-s. 2 (*e*), and the Foreign Judgments (Reciprocal Enforcement) Act, 1933, the plaintiffs' right to sue upon the Canadian judgment had disappeared.

Part II. of the Administration of Justice Act, 1920, provides as follows:—

Sect. 9, sub-s. 1: "Where a judgment has been obtained in "a superior court in any part of His Majesty's dominions "outside the United Kingdom to which this Part of this Act "extends, the judgment creditor may apply to the High Court "in England . . . . to have the judgment registered in the "court, and on any such application" the Court may so order.

Sub-s. 2: "No judgment shall be ordered to be registered "under this section if—. . . (*e*) the judgment debtor satisfies "the registering court either that an appeal is pending, or "that he is entitled and intends to appeal, against the "judgment."

Sect. 14, sub-s. 1: "Where His Majesty is satisfied that "reciprocal provisions have been made by the legislature of "any part of His Majesty's dominions outside the United "Kingdom for the enforcement within that part of His "dominions of judgments obtained in the High Court in "England . . . . His Majesty may by Order in Council "declare that this Part of this Act shall extend to that part "of His dominions, and on any such Order being made this "Part of this Act shall extend accordingly."

An Order in Council was made extending Part II. of the Administration of Justice Act, 1920, to the Province of Saskatchewan, but no Order in Council had been made with regard to Ontario.

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, Part I. of which, entitled "Registration of Foreign Judg-"ments," comprised ss. 1–8, provided:—

Sect. 1, sub-s. 1: "His Majesty, if he is satisfied that, in "the event of the benefits conferred by this Part of this Act "being extended to judgments given in the superior courts "of any foreign country, substantial reciprocity of treatment "will be assured as respects the enforcement in that foreign "country of judgments given in the superior courts of the "United Kingdom, may by Order in Council direct—(*a*) that "this Part of this Act shall extend to that foreign country; "and (*b*) that such courts of that foreign country as are "specified in the Order shall be deemed superior courts of "that country for the purposes of this Part of this Act."

Sect. 6: "No proceedings for the recovery of a sum "payable under a foreign judgment, being a judgment to "which this part of this Act applies, other than proceedings "by way of registration of the judgment, shall be entertained "by any court in the United Kingdom."

Sect. 7, sub-s. 1: "His Majesty may by Order in Council "direct that this Part of this Act shall apply to His Majesty's "dominions outside the United Kingdom and to judgments "obtained in the courts of the said dominions as it applies "to foreign countries and judgments obtained in the courts "of foreign countries, and, in the event of His Majesty so "directing, this Act shall have effect accordingly, and Part II. "of the Administration of Justice Act, 1920, shall cease to "have effect except in relation to those parts of the said "dominions to which it extends at the date of the Order."

Sub-s. 2: "If at any time after His Majesty has directed "as aforesaid an Order in Council is made under section one of "this Act extending Part I. of this Act to any part of His

"Majesty's dominions to which the said Part II. extends as "aforesaid, the said Part II. shall cease to have effect in "relation to that part of His Majesty's dominions."

An Order in Council called The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, was made on November 10, 1933, under s. 7 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, directing that Part I. of the Act should apply to His Majesty's Dominions outside the United Kingdom and to judgments obtained in the Courts of the said Dominions and to territories which are under His Majesty's protection.

No further Order in Council had been made extending Part I. of the Act to the province of Ontario, and specifying the Courts which were to be deemed superior Courts of Ontario.

1937. March 22. MacKinnon J. The defendant in this action, as the trustee in bankruptcy for a Mr. Welsdale, brought an action in 1933 in the Supreme Court of Ontario against the present plaintiffs, in which he claimed that a number of shares in the plaintiff company belonged to Mr. Welsdale and that he was entitled to be registered in respect to them. In that action the Court of first instance in Ontario decided in favour of the present plaintiffs, the defendants in that action, and gave judgment dismissing the present defendant's claim with costs. An appeal from that judgment was made by the present defendant to the Court of Appeal in Ontario, and the Court of Appeal dismissed that appeal and gave a further judgment in favour of the present plaintiffs with the costs of the appeal. The costs payable to the present plaintiffs in those two proceedings in Ontario have been duly taxed. A certain amount of those costs has been satisfied by money paid in by the defendant by way of security and there remains a balance due of 1108*l.*

On January 20, 1937, the plaintiffs issued their writ against the defendant in this Court claiming that 1108*l.* as the balance of the costs due to the plaintiffs upon the judgment of the Supreme Court of Ontario. There is no question

C. A.
1937

YUKON CONSOLIDATED GOLD CORPORATION
v.
CLARK.

MacKinnon J.

that certainly up to 1920, and probably up to 1933, it was legitimate and possible for a plaintiff, if he had obtained judgment in a Canadian Court for a sum of money, to sue upon that judgment in this Court, and that is what the plaintiffs have done. The defence in this action by the defendant raises the point that the right of the plaintiffs to sue upon that Canadian judgment has disappeared. It is said that the plaintiffs ought to have adopted a different form of machinery as provided by a statute which has put an end to the right to sue upon a Canadian judgment. That was first of all put forward in the affidavit by way of defence to this action under Order XIV., and reliance was put upon s. 9, sub-s. 1, of the Administration of Justice Act, 1920. It provides: "Where a judgment has been obtained in a "superior court in any part of His Majesty's Dominions "outside the United Kingdom to which this Part of this Act "extends, the judgment creditor may apply to the High "Court in England or Ireland, or to the Court of Session in "Scotland, at any time within twelve months after the date "of the judgment, or such longer period as may be allowed "by the court, to have the judgment registered in the court, "and on any such application the court may, if in all the "circumstances of the case they think it is just and convenient "that the judgment should be enforced in the United Kingdom, "and subject to the provisions of this section, order the "judgment to be registered accordingly." It is provided further by s. 14, sub-s. 1, as follows: "Where His Majesty "is satisfied that reciprocal provisions have been made by "the legislature of any part of His Majesty's dominions "outside the United Kingdom for the enforcement within that "part of His dominions of judgments obtained in "the High Court in England, the Court of Session in Scotland, "and the High Court in Ireland, His Majesty may by Order "in Council declare that this Part of this Act shall extend "to that part of His dominions, and on any such Order "being made, this Part of this Act shall extend accordingly." Certain Orders in Council have been made under that provision, but no Order in Council was made as regards Ontario.

C. A.
1937

YUKON CONSOLIDATED GOLD CORPORATION v. CLARK.

MacKinnon J.

In fact the only constituent province in the Dominion of Canada with regard to which an Order in Council was made was Saskatchewan. Inasmuch as no Order in Council was made with regard to Ontario, I am satisfied that it was not open to the plaintiffs in this case to apply under s. 9 of the Act of 1920 to have their judgments for these costs registered pursuant to that Act. Even if it were so, I am not at all clear that they would not be entitled at their option either to apply for registration under that Act or to bring an action as they have done in this Court. In other words there is nothing in that Act of 1920, as there is in the subsequent Act of 1933, forbidding the bringing of an action on a Colonial judgment and making it enforceable by registration under the Act as the only available method of procedure.

There is only one further matter to which I would draw attention in the Act of 1920. Sect. 13 provides that: "His Majesty may by Order in Council declare "that this Part of this Act shall apply to any territory "which is under His Majesty's protection, or in respect of "which a mandate is being exercised by the Government of "any part of His Majesty's dominions, as if that territory "were part of His Majesty's dominions, and on the making "of any such Order this Part of this Act shall, subject to the "provisions of the Order, have effect accordingly." The effect of that seems to me to be that if His Majesty, by an Order in Council, says that some Protectorate is deemed to be included in this Act, then it is treated as a Dominion or is in the same position as a Dominion, but the question of registering judgments would not arise unless a specific Order in Council was made under s. 14 specifying the Courts of the Protectorate to which this Part of the Act of 1920 would apply.

A further Act was passed in 1933 called the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Part I. of this Act is headed "Registration of Foreign Judgments." Sect. 1 provides: "His Majesty, if he is satisfied that, in the event "of the benefits conferred by this Part of this Act being "extended to judgments given in the superior courts of any "foreign country, substantial reciprocity of treatment will be "assured as respects the enforcement in that foreign country "of judgments given in the superior courts of the United "Kingdom, may by Order in Council direct—(*a*) that this "Part of this Act shall extend to that foreign country." Mr. Eddy argued that the defendant had an ample defence to this claim because this is a proceeding for recovery of a sum under a judgment to which this Part of this Act applies, and therefore I am forbidden by s. 6 to entertain this action. The question, therefore, is whether the judgment of this Court in Ontario is a judgment to which Part I. of the Foreign Judgments (Reciprocal Enforcement) Act of 1933 applies. Mr. Eddy argued that is so by reason of s. 7, sub-s. 1, which provides: "His Majesty may by Order in Council "direct that this Part of this Act shall apply to His Majesty's "dominions outside the United Kingdom and to judgments "obtained in the courts of the said dominions as it applies "to foreign countries and judgments obtained in the Courts "of foreign countries, and, in the event of His Majesty so "directing, this Act shall have effect accordingly and Part II. "of the Administration of Justice Act, 1920, shall cease to "have effect except in relation to those parts of the said "dominions to which it extends at the date of the Order." On November 10, 1933, an Order in Council under s. 7 was made, directing that Part I. of the Foreign Judgments (Reciprocal Enforcement) Act of 1933 shall apply to His Majesty's Dominions outside the United Kingdom. The effect of that Order in Council was that Part I. of the Act applies to the Dominion of Canada, and therefore to Ontario as one of the constituent Provinces of that Dominion. What does that mean? It means that the Dominion of Canada may be treated for the purposes of this Act as being in the same position as a foreign country. It follows that under s. 1 His Majesty, by a further Order in Council, may order that this Act shall extend to Ontario, and such Courts of Ontario as are specified in such further Order shall be deemed superior Courts for the purposes of this Part of this Act. If that further Order in Council had been made, directing that the Supreme Court of Ontario should be deemed a superior Court for the purposes of this Act, then I agree that the plaintiffs under s. 2, sub-s. 1, might have applied to have this judgment registered, and in that case under s. 6 this present action, being proceedings for recovery of a sum of money other than proceedings by way of registration, would have been one which I should be unable to entertain. But no Order under Part I. of the Act of 1933 has ever been made specifying that the Act shall extend to Ontario, and that these particular Courts in Ontario shall be deemed to be superior Courts. In my opinion, the result is that it was not open to the plaintiffs to adopt the alternative or indeed the essential method of applying to register this judgment under s. 2 of the Act of 1933, because there has not been the necessary Order in Council making that feasible. It must be noted that, just as in the Act of 1920 there is the difference in language between the use of the word "apply" in s. 13 and the word "extend" in s. 14, so in this Act of 1933 there is the same variation in language between the word "apply" in s. 7 and the word "extend" in s. 1. The result is that I think this action is not barred either by the provisions of the Act of 1920 or by s. 6 of the Act of 1933.

There remains a further point, which was taken by Mr. Eddy. The present defendant has given notice of appeal to the Privy Council from the judgment of the Court of Appeal in Ontario, and he has been required under the rules of court of the Court of Appeal in Ontario to give security for the costs of that appeal. That has been done to the satisfaction of the Court in Ontario. Then Mr. Eddy relies on c. 86 of the Revised Statutes of Ontario, which provides that no appeal to the Privy Council shall be allowed unless security for costs is given, and that when such security is given there shall be a stay of execution. Now no application for a stay of execution was made to the Supreme Court of Ontario, and no order for a stay of execution has been made by that Court. It could only direct a stay of execution if the requirements of s. 3 (*d*) had been complied with—namely, if the appellant,

C. A.
1937
YUKON CONSOLIDATED GOLD CORPORATION v. CLARK.
MacKinnon J.

the present defendant, had given security to the satisfaction of the Supreme Court for the payment of these moneys if the appeal were dismissed. No such security has been given, and therefore I am clear that the event has not happened upon which either automatically or by any order of Court in Ontario would there be any stay of execution of the rights of the plaintiffs to recover these costs, which they are now endeavouring to do. That being so, there is in that legislation no bar to the right of the plaintiffs to sue upon this judgment for these costs. The result is, I think, there must be judgment for the plaintiffs for the amount claimed with costs, but having regard to the circumstances I think it right to give effect to the spirit of s. 3 (*d*) of c. 86 of the Revised Ontario Statutes by further directing in this case a stay of execution for fourteen days, and if within that time the money is brought into Court, or security for it is given to the satisfaction of a Master, there shall be a further stay till the hearing of the appeal before the Privy Council. There will be liberty to apply to remove such stay on the ground that the appeal has been abandoned or that it has not been pursued with reasonable despatch.

The defendant appealed. The appeal was heard on January 18, 1938.

J. P. Eddy K.C. and *F. H. Lawton* for the appellant. The Administration of Justice Act, 1920, contained provisions in Part II. dealing with the reciprocal enforcement of judgments in the United Kingdom and in other parts of His Majesty's Dominions, and s. 9, sub-s. 1, enabled a creditor who had obtained a judgment in a superior Court in any part of His Majesty's Dominions to have the judgment registered in the High Court in England. Sect. 14, sub-s. 1, enabled His Majesty to make an Order in Council extending Part II. of the Act to any part of His Dominions in which reciprocal provisions had been made for the enforcement within that part of His Dominions of judgments obtained in the High Court in England, etc. The only part of the Dominion of Canada in relation to which an Order had been made under the Act of 1920 was the Province of

C. A.
1938
Yukon Consolidated Gold Corporation v. Clark.

Saskatchewan. The effect of s. 7, sub-s. 1, of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, was that when an Order was made under that section applying Part I. of that Act to His Majesty's Dominions outside the United Kingdom, the Act applied to the whole of His Majesty's Dominions except that part in relation to which an Order had already been made under the Act of 1920. The effect of s. 7, sub-s. 2, of the Act of 1933 was that an Order might be made applying Part I. of the Act of 1933 to that part of His Majesty's Dominions in relation to which a specific Order had been made under the Act of 1920, as for example, Saskatchewan, and in that event the former Order made under the Act of 1920 would cease to have effect. An Order was made on November 10, 1933, entitled the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, applying Part I. of the Foreign Judgments Reciprocal Enforcement Act, 1933, to the whole of His Majesty's Dominions outside the United Kingdom, and therefore to Ontario, and accordingly, under s. 6 of the Act of 1933, these proceedings ought not to have been entertained by MacKinnon J. as they were proceedings for the recovery of a sum of money payable under a Dominion judgment other than proceedings for the registration of the judgment. MacKinnon J. was wrong in holding that the Order in Council of November 10, 1933, was not effective until there was also another Order applying Part I. of the Act of 1933 to a particular Dominion, in this case to Ontario.

St. John Field K.C. and *Gerald Gardiner* for the respondents, the Yukon Consolidated Gold Corporation, Ld. The judgment of MacKinnon J. was correct. The fallacy in the argument for the appellant lies in failing to observe the distinction which is drawn in the Act of 1933 between the words "extend" and "apply." Sect. 1 provides that His Majesty may by Order in Council direct that Part I. of the Act shall "extend" to a foreign country. In order to bring into operation Part I. of the Act there must be an Order in Council extending the Act to a particular foreign country, and s. 6 prohibiting the enforcement of a foreign judgment in the United Kingdom except by proceeding for the registration of such judgment will not come into operation until after an Order in Council has been made extending the Act to that foreign country. Sect. 7 merely provides that His Majesty's Dominions may be treated in the same way as foreign countries provided there is reciprocity of treatment with regard to the enforcement of judgments. The only way in which the Act can apply to a foreign country is by an Order in Council extending the Act to that particular foreign country. The Act does not extend to the judgments given in all the Courts of a foreign country but only to the judgments given in the superior Courts of a foreign country. There is no definition in the Act as to what Courts are superior Courts, but there is a provision in s. 1, sub-s. 1 (*b*), that "such courts of that foreign "country as are specified in the Order"—namely, the Order extending the Act to a particular foreign country—"shall be "deemed superior courts of that country for the purposes of this "Part of this Act." It is therefore clear that there must be an Order extending the Act to a particular foreign country and not merely a general Order. Orders in Council have been made applying the Act of 1920 to our colonies and territories as set out in the Annual Practice for 1938, pp. 764–5, including Saskatchewan. Sub-s. 2 of s. 7 of the Act of 1933 provides that if His Majesty has by Order in Council given a general direction under sub-s. 1 of s. 7 that the Act shall apply to the Dominions and to judgments obtained in the Courts of the Dominions as it applies to foreign countries and to judgments obtained in the Courts of foreign countries, then an Order in Council may be made under s. 1 of the Act of 1933 extending Part I. of the Act to any part of His Majesty's Dominion to which Part II. of the Act of 1920 has been extended. That section clearly contemplates the making of two Orders. There must be an Order in Council extending the Act of 1933 to a particular Dominion and specifying the Courts of that Dominion which are to be deemed to be superior Courts for the purposes of the Act. It is stated in the Annual Practice for 1938, p. 771, that, until Orders in Council are made extending Part I. of the Foreign Judgments, etc., Act, 1933, to specific parts of His Majesty's Dominions, judgments obtained in any Dominion, etc., to which Part II. of the Administration of Justice Act, 1920, has not been applied cannot be registered. See also the Yearly Practice for 1938, p. 734. The same distinction between the words "extend" and "apply" is to be found in the Act of 1920.

J. P. Eddy K.C. in reply. With regard to the contention that s. 7, sub-s. 2, of the Act of 1933 contemplates the making of two Orders, sub-s. 1 of s. 7 provides for an exception as regards the Province of Saskatchewan, which was the only part of the Dominion of Canada to which Part II. of the Act of 1920 had been made to apply. Sub-s. 2 of s. 7 contemplates the making of a second Order as regards Saskatchewan.

1938. January 18. GREER L.J. This is a case of considerable difficulty, but we do not think any useful purpose will be served by reserving our decision and putting it into writing. The question in this case involves the true meaning of ss. 6 and 7 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. I have come to the conclusion, on full consideration of the argument, that I ought to agree with the view which is expressed by the learned editors of the practice books known as the White Book and the Red Book and with the order made by the learned judge.

The history of the matter is as follows. Until the Act of 1933 there was no restriction imposed on the right of a litigant, if he chose to do so, to sue at common law upon a foreign judgment, if he could serve his writ. He sometimes was in difficulty in bringing his case within the code for service of the writ outside the jurisdiction, but he sometimes had the good fortune to catch his foreign debtor in this country and could then sue him by serving him with the writ in this country. Now as I read the Administration of Justice Act of 1920 that Act did not take away from a judgment creditor his right to sue on either a foreign judgment or upon a colonial judgment, but gave him a right to register the judgment in the case of any Dominion or colonial judgment, if he could show that it was a binding judgment, subject to the power of the Court to deal with the costs incurred in registering his judgment. The Act of 1920 provided for the registration of a judgment obtained in His Majesty's Dominions, but did not deal with foreign judgments. The heading of the Act of 1920 is: "An Act to amend the law "with respect to the administration of justice and with "respect to the constitution of the Supreme Court, to facilitate "the reciprocal enforcement of judgments and awards in the "United Kingdom and other parts of His Majesty's Dominions "or Territories under His Majesty's protection," and the heading of Part II. of the same statute is: "Reciprocal "Enforcement of Judgments in the United Kingdom and in "other parts of His Majesty's Dominions," and did not in any way deal with foreign judgments. It was however fully appreciated by those who thought about foreign judgments, that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this country. Whereas we enforced foreign judgments by means of action in this country, foreign countries refused to enforce the judgments obtained in this country, and it was to deal with that situation that the statute of 1933 was passed, but incidentally, it also dealt with Dominion judgments. Now it seems to me to be quite clear with regard to s. 1 and s. 2 of the Act of 1933, that the statute is concerned with the enforcement of foreign judgments and Dominion judgments, where it could be established that there were reciprocal rights in the foreign countries or in the Dominions, and when we come to the relevant sections, it was provided by s. 6, because the foreign countries with which we entered into negotiations required that it should be so provided, in order to obtain their agreement to a convention with regard to the reciprocal obligations of this country and the foreign country for the enforcement of the judgment, that: "No proceedings for the recovery of a "sum payable under a foreign judgment, being a judgment to "which this Part of this Act applies, other than proceedings "by way of registration of the judgment, shall be entertained "by any Court in the United Kingdom." That is the first

C. A.
1938

YUKON CONSOLIDATED GOLD CORPORATION v. CLARK.

Greer L.J.

time that any restriction was placed upon the right of anyone to say that a foreign judgment created a debt which could be enforced in this country. Then s. 7, sub-s. 1, goes on to say this: "His Majesty may by Order in Council direct that this Part "of this Act shall apply to His Majesty's dominions outside "the United Kingdom and to judgments obtained in the "courts of the said dominions as it applies to foreign countries "and judgments obtained in the courts of foreign countries." I read that as meaning that it applied to the Dominions only to the extent to which it had been applied by the statute to foreign judgments. I thought at one time that I might put a wider meaning on it, but, on consideration, I do not think I am entitled to put words into s. 7 which would very much alter the effect of that section. If we look at sub-s. 2 of s. 7, we find these words: " If at any time after His Majesty has "directed as aforesaid"—that is under the earlier part of the section—" an Order in Council is made under s. 1 of this "Act extending Part I. of this Act to any part of His Majesty's "dominions to which the said Part II. extends as aforesaid, "the said Part II. shall cease to have effect in relation to "that part of His Majesty's dominions." That would only take place after an Order had been passed extending Part I. of the Act to any part of His Majesty's Dominions. An Order was made called The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, which says this: " Now, therefore, His Majesty, by "virtue and in exercise of his powers under the said Act, is "pleased by and with the advice of His Privy Council to "order, and it is hereby ordered as follows:—(1.) Part I. of the "Foreign Judgments (Reciprocal Enforcement) Act, 1933, "shall apply to His Majesty's dominions outside the United "Kingdom and to judgments obtained in the courts of the "said dominions and to territories which are under His "Majesty's protection, ..." Now it seems to me a strange construction of the Act and the Order to say that where the section says it shall apply to Dominion judgments as it applies to foreign judgments, then, though it is quite clear that in the case of foreign judgments reciprocal arrangements have to be proved to bring the Act into force, in the case of the Dominions there is no necessity for proving there is any reciprocity. In that respect, I think the argument is not well founded, because I think the intention of the statute is that where there is, and only where there is, an Order extending the Act to the particular Dominion in question, the provisions of the Act shall apply to the Dominion and the judgment in question.

We have heard a good deal about the Saskatchewan Order, and we are asked to say that because there is an exception which would apply to the Saskatchewan Order, therefore the whole section must be read as if an extension Order had already been made, though we know as a fact no such extension Order has been made. For these reasons I agree with the learned judge that ss. 6 and 7 of the Act will not apply until there has been an Order in Council extending the provisions of the statute to the Dominions and to judgments obtained in those Dominions.

On the question whether the section as drawn refers to any Court in a Dominion, I am inclined to think that taking the whole statute together one ought to insert, before the word "Court," to give a proper interpretation to the section, the word "superior," so that it would read "superior Court of "the said Dominion"; but be that as it may, it does not make any difference to the fact that Dominion judgments can only be enforced in the same way and to the same extent that foreign judgments can be enforced, which, ex concessis, cannot be enforced until reciprocity is obtained. I think the Dominion judgments are upon the same basis as foreign judgments and I agree with the learned judge that under those circumstances ss. 6 and 7 have no application to this case, and they leave the plaintiffs in this case untrammelled with regard to their rights at common law, and they can sue on the judgment. They have sued upon the judgment, and on that ground they are entitled to go on with the action. I agree that this appeal should be dismissed, and dismissed with costs.

Slesser L.J. I am of the same opinion. In order to arrive at a conclusion in this case, it is necessary to consider two statutes: Part II. of the Administration of Justice Act, 1920, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Under the earlier Act of 1920 power was given, in circumstances which I will describe, to register judgments. There was, however, no prohibition, such as is to be found in s. 6 of the Act of 1933, against proceedings for the recovery of a judgment debt other than proceedings for the registration of the judgment, but nevertheless, I find in that earlier Act, dealing as it does only with registration, considerable assistance in the interpretation of the 1933 Act, which is the Act immediately to be considered here. By the Act of 1920, Part II., s. 9, it is provided that registration may be effected, but there is a general provision in ss. 13 and 14 that s. 9 and the consequent sections shall only apply if Orders in Council have been made extending them to His Majesty's Dominions. Sect. 13 is dealing with territories under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions; and it is provided that " His Majesty may by Order in Council declare "that this Part of this Act shall apply to any territory which "is under His Majesty's protection, or in respect of which a "mandate is being exercised by the Government of any part "of His Majesty's dominions, as if that territory were part "of His Majesty's dominions"; that is, if an Order is made, the territory becomes, for the purpose of the application of Part II. of the 1920 Act, part of His Majesty's Dominions. When we turn to s. 14 we find a difference in the language. Sub-s. 1 provides: " Where His Majesty is satisfied that "reciprocal provisions have been made by the legislature of "any part of His Majesty's dominions outside the United "Kingdom for the enforcement within that part of His "dominions of judgments obtained in the High Court in "England, the Court of Session in Scotland, and the High "Court in Ireland, His Majesty may by Order in Council "declare that this Part of this Act shall extend to that part "of His dominions, and on any such Order being made this "Part of this Act shall extend accordingly." It is therefore clear to my mind that under the Act of 1920, in dealing with a territory, it is necessary that two Orders be made, the first Order applying to the territory in order to bring it into the position of a Dominion, and a second Order, to be made when His Majesty is satisfied that the provisions for the necessary reciprocal enforcement exist, that Part II. of the Act shall extend to that part of the Dominions. In the case of the Dominion itself, of course, since the Act applies to it immediately, the earlier Order in Council which applies the provisions of the Act to a territory would not be necessary; all that would be necessary would be the satisfaction of His Majesty as to the reciprocal enforcement of judgments. That is the position under the Act of 1920. In 1933 this addition was made to the general machinery of the Act, and its functions: Under s. 6 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, it was provided that: "No proceedings for the "recovery of a sum payable under a foreign judgment, being "a judgment to which this Part of this Act applies, other "than proceedings by way of registration of the judgment, "shall be entertained by any court in the United Kingdom." As my Lord has said, this Act therefore extends the prohibition and other provisions to foreign judgments as well as to judgments in Dominions and territories. The provisions as to enforcement of foreign judgments are quite clear. There is really no dispute that the Order in Council applying Part I. of the 1933 Act (which includes s. 6) to foreign countries, is limited in the sense that His Majesty must be "satisfied that, "in the event of the benefits conferred by this Part of this "Act being extended to judgments given in the superior "Courts of any foreign country, substantial reciprocity of "treatment will be assured as respects the enforcement in "that foreign country of judgments given in the superior "Courts of the United Kingdom." That is one limitation: that there shall be substantial reciprocity of treatment. Then the matter is also limited, as it had been limited by the Act of 1920, in the case of Dominions, to the judgments of superior Courts. Sect. 1, sub-s. 2, says: "Any judgment of a superior "court of a foreign country to which this Part of this Act "extends . . . . shall be a judgment to which this Part of "this Act applies." Now in order to define what is a superior Court, it is provided that that shall be specified in the Order. The Order in Council may direct (s. 1 (*b*)) : "that such courts "of that foreign country as are specified in the Order shall "be deemed superior courts of that country for the purposes "of this Part of this Act," and the reason for that provision was this : the term "superior court" is a term of art of a local nature. There are, strictly speaking, two ways in which a Court may properly be called a superior court ; it may be a superior court of record, that is a superior court at common law, as is stated in Bacon's Abridgement on "Courts" : "Superior Courts of record are, again, those that are more "principal or less principal ; the more principal ones are the "Lords House in Parliament, the Chancery, King's Bench, "Common Pleas, and Exchequer ; and by Hale, such are the "justices itinerant ad communia placita and ad placita forestae. "The less principal ones are such as are held by commission "of gaol delivery, oyer and terminer, assize, nisi prius, etc." In addition to that there have been from time to time (it is not necessary to go through them) statutory definitions stating which Courts are superior Courts, all words which are quite inappropriate to foreign tribunals, which therefore have to be defined by Order or some other appropriate instrument, as being superior Courts in order to satisfy the requirements of s. 1 of the Act. So much for foreign judgments. Now one can pass to s. 7, which deals with the case we have here to consider, of a judgment in a Dominion. That states that "His Majesty may by Order in Council direct that this "Part of this Act shall apply to His Majesty's dominions "outside the United Kingdom and to judgments obtained in "the courts of the said dominions as it applies to foreign "countries and judgments obtained in the courts of foreign "countries." Pausing there, the word "apply," it will be noticed, is a similar word to that which has been used in the 1920 Act applying the Dominion position to a territory ; it says the Act shall "apply" ; it leaves out altogether, to my mind, the question of the requirements both with regard to reciprocal enforcement and with regard to superior Courts, which are stated in s. 7, sub-s. 1. The section goes on to provide: "and, in the event of His Majesty so directing, this Act shall "have effect accordingly." Now in accordance with that provision, there was a statutory Order made on November 10, 1933, entitled "The Reciprocal Enforcement of Judgments "(General Application to His Majesty's Dominions, etc.) Order, "1933," which recites the provisions which I have already mentioned, and says in its operative part, that "Part I. of "the Foreign Judgments (Reciprocal Enforcement) Act, 1933, "shall apply to His Majesty's dominions outside the United "Kingdom and to judgments obtained in the courts of the "said dominions." It goes on to deal with territories under His Majesty's protection. It will be noticed that in that Order, which is merely dealing with the application of the Act as directed, there is no reference whatever to any particular part of His Majesty's Dominions; it refers to the whole Dominions without exception; and secondly, it does not deal in any way with any question of reciprocal enforcement of judgments which is said to be the purpose of the Order, the title being "The Reciprocal Enforcement of "Judgments (General Application to His Majesty's Dominions) "Order." If Mr. Eddy is right, and this Order has the effect of immediately applying the provisions, among others, of s. 6 of the Act of 1933, it has applied them indifferently to the whole of the Courts of His Majesty's Dominions regardless of whether they have or have not entered into reciprocal arrangements for the enforcement of judgments of the Courts in England or not. I see no reason to suppose that such an extraordinary result was intended, or has been produced. It is contrary to the provisions both of the Act of 1920 and of the Act of 1933; it is contrary to the purpose of those Acts in that they are dealing with the enforcement of judgments reciprocally. On that, I think that perfect sense may be made of the section by reading it in the way for which Mr. St. John Field contends—namely: that that Order having been made applying the Act to Dominions, which would otherwise apply only to foreign countries, that put the Dominions in the same position with regard to their judgments as they would have been had they been foreign judgments under s. 1. I think that is what s. 7 says. It says that on the Order being made, "this Part of this Act shall apply to His Majesty's "Dominions outside the United Kingdom and to judgments "obtained in the courts of the said dominions as it applies "to foreign countries and judgments obtained in the courts "of foreign countries." When we pass that, I think we are therefore directed to s. 1, and we find, bearing in mind that the Dominions come within the ambit of the Act as well as the foreign countries, that His Majesty, if he is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to judgments given in the superior Courts of any Dominion, substantial reciprocity of treatment will be assured, may, by Order in Council, direct that this part of that Act shall apply to the Dominions and that such Courts of that Dominion as are specified in the Order shall be deemed superior Courts of the country for the purposes of this Part of this Act.

I have only this further matter to remark upon, and that is with regard to the provision at the end of sub-s. 1 of s. 7, on the direction being made that it shall apply to the Dominions as it applies to foreign countries: "in the event "of His Majesty so directing, this Act shall have effect "accordingly and Part II. of the Administration of Justice "Act, 1920, shall cease to have effect except in relation to "those parts of the said dominions to which it extends at "the date of the Order"; that is to say, that it was to apply generally to the whole of His Majesty's Dominions outside the United Kingdom, but that those Orders which had already been made under the provisions of the Act of 1920, should continue to have validity. That does not, to my mind, in any way indicate that it is not necessary in those parts of His Majesty's Dominions as to which no Order was made under the Act of 1920, that there should be a specific Order in Council extending the provisions of Part I. of the Act of 1933 to them after there had been a general direction applying the Act to the whole of His Majesty's Dominions outside the United Kingdom. Sub-s. 2 of s. 7 seems to me to indicate, notwithstanding the argument of Mr. Eddy, that that was the intention of the Legislature, because it says: "If at any time after His Majesty has directed as aforesaid," that is after His Majesty has made an Order in Council applying the Act generally to the Dominions, " an Order in "Council is made under section one of this Act extending Part I. "of this Act to any part of His Majesty's dominions to which "the said Part II. extends as aforesaid, the said Part II. shall "cease to have effect in relation to that part of His Majesty's "dominions." What Mr. Eddy argues is this: that in so far as the places to which the Order under the Act of 1920 applies were excluded from the general Order in Council applying the statute to His Majesty's Dominions, this does no more than to say that an Order in Council may be made bringing that particular part within the ambit of that Act of 1933. I think the error in that argument is this; that on the assumption the Order in Council applying the Act is general; it would apply, if he is right, to the whole of the British Dominions notwithstanding the fact that the Orders made under the Act of 1920 still exist in a part of those Dominions. The Order, in other words, would be absolutely general, as it purports to be, that is, it applies to His Majesty's Dominions, that is, to parts where Orders were or were not made under the Act of 1920; but s. 7, sub-s. 1, says that the Orders made under the Act of 1920 shall continue to exist notwithstanding the general Order, and alongside of the general Order, in so far as they were made under the Act of 1920. If that was right, then I cannot see what power there would be in His Majesty to make yet another Order in Council dealing with that Order which, under the Act of 1920, still had effect. I think on the other hand, on Mr. St John Field's view, the whole thing is quite intelligible: if, as he submits, and I think rightly, two Orders in Council are necessary, one to apply the Act generally, and the second to extend it to particular areas, then sub-s. 2 of s. 7 is dealing with an extension to an area in which an Order has already been made under the Act of 1920; it gives power to make a second Order in Council dealing with that part. On that view, the whole matter seems to me to be consistent. I think the learned judge was right in holding that the Order in Council does no more in the first instance than apply the Foreign Judgment (Reciprocal Enforcement) Act to the Dominions, and thereafter it is necessary to make such Orders by way of extension, as if the judgment had been the judgment of a foreign Court, and not the judgment of a Dominion.

Scott L.J. I agree with both judgments. I would like to add a few observations as to the method of drafting the Act of 1933, which seems to me quite clear. Till that year, foreign judgments had not been dealt with in this country except by the old procedure of an action upon them. Sects. 1 to 5 introduced provisions enabling Orders in Council to be made on certain conditions applying a new system of enforcing judgments—namely, by registration. The conditions were substantially these: (1.) that the arrangement should be limited to superior Courts of a foreign country, and (2.) that there should be reciprocity. On those conditions, the first five sections of the Act enabled detailed Orders in Council to be made in respect of individual foreign countries, and by sub-s. 1 of s. 1 power was given by Order in Council to direct that this Part of the Act should extend to that foreign country, and secondly, such Courts of that foreign country as were specified in the Order should be deemed to be superior Courts of that country for the purpose of this Part of this Act. Now bearing those provisions in mind I turn to s. 7 of the Act. Sect. 7 in my view contains in sub-s. 1 an enabling power delegating to His Majesty in Council power to legislate—namely, applying the Act as regards foreign countries and foreign judgments to countries within the British Empire. It might quite well have been drafted by employing a different method, for instance, a Resolution of each House of Parliament applying the Act to colonies within the British Empire. Instead of that, the enabling power is conferred upon His Majesty in Council, but the whole operation of sub-s. 1 of

s. 7, is simply to make Part I. of the Act of 1933 apply as a whole to countries within the British Empire, and to Protectorates and mandated territories, just as foreign countries are made to come within the Act by the first five sections of the Act. Sub-s. 1 of s. 7, by itself, has no operative effect on any part of the British Empire. In order to bring a particular part of the Empire within the operative provisions of Part I. of the Act, it is necessary that there should be a further Order in Council, just as, under s. 1 of the Act, there has to be an Order in Council applying the provisions of the Act to a particular foreign country. If one reads sub-s. 2 of s. 7 in that way, it is quite clear: if at any time after His Majesty has, by Order in Council under s. 7, sub-s. 1, directed as aforesaid that the Act shall apply to His Majesty's Dominions, then Orders in Council may be made under s. 1 of the Act in accordance with the whole procedure of s. 1 and subject to the conditions of s. 1; that means that there must be the satisfaction of the Privy Council that the conditions of sub-s. 1 of s. 1 as to reciprocity and as to a suitable list of superior Courts are complied with, before the Order can be made. Until a detailed Order of that kind is made, there is no power at all to apply the Act of 1933 to any particular Dominion or territory within what we call the British Empire. The word "Dominion" of course is used in its wide sense, and not in any way in the narrow sense of the five great Dominions. For these reasons, I am quite clear that the Order of the learned judge was right.

Appeal dismissed.

Solicitors for appellant: *Percy Haseldine & Co.*
Solicitors for respondents: *Broad & Son.*

R. F. S.

C. C. A.

1938

March 7, 22.

THE KING *v.* BERNHARD.

Criminal law—Demanding money with menaces—Claim of right made in good faith—Claim unfounded in law—Conviction quashed—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 1, 30.

Honest belief in a right to the money demanded constitutes a good defence to a charge of demanding money with menaces, with intent to steal the same, contrary to s. 30 of the Larceny Act, 1916. A person has a claim of right within the meaning of s. 1 of the Larceny Act, 1916, if he is honestly asserting what he believes to be a lawful claim, even though his claim may be unfounded in law or in fact.

APPEAL against conviction.

The following statement of the facts is taken from the judgment of the Court. The appellant was tried at the Central Criminal Court before Lord Hewart C.J. on an indictment which charged her with demanding money with menaces of a person, who was referred to during the trial as " Mr. A.", with intent to steal the same, contrary to s. 30 of the Larceny Act, 1916. (1) She was convicted and sentenced to nine months' imprisonment, and Lord Hewart C.J. recommended her for deportation. She appealed to this Court against her conviction, her principal grounds of appeal being that the learned judge had misdirected the jury as to the meaning of the words: " without a claim of right made in "good faith " which are contained in the definition of stealing in s. 1 of the Larceny Act, 1916 (2), and had failed to leave to the jury for their decision the question whether the appellant, when she demanded money from the prosecutor, made the demand " fraudulently and without a claim of right made "in good faith."

---

(1) Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 30: " Every " person who with menaces . . . . " demands of any person any- " thing capable of being stolen " with intent to steal the same " shall be guilty of felony " . . . ."

(2) Larceny Act, 1916, s. 1: " For the purposes of this Act— " (1.) A person steals who . . . . " fraudulently and without a " claim of right made in good " faith, takes and carries away " anything capable of being " stolen. . . ."

This case presents some remarkable and very unusual features. It appears from the evidence that the appellant and the prosecutor met for the first time during a railway journey on the Continent in May, 1937. The prosecutor was a married man; the appellant, who is a Hungarian, was formerly a married woman but the marriage had been dissolved. After this casual meeting an association began which lasted for some months, and although the prosecutor swore in answer to a question in cross-examination that the appellant was not his mistress, nobody acquainted with the undisputed facts of the case is likely to doubt that the appellant spoke the truth when she contradicted that statement. It was, however, common ground that by the month of August, 1937, at the latest, any immoral relations which there may have been between them had ceased. According to the prosecutor, the appellant had told him at some time in June that she had lost her money on the Stock Exchange and that unless he could help her, "she would have to go on the streets or commit "suicide." A letter from him to the appellant was produced in which he said: "I will do my best to give you the year "which you wish so that you may be able to regulate your "life," and eventually, in or about August, 1937, he agreed with her, according to his evidence, to pay her 20*l.* a month for a year. The appellant, he said, asked for a lump sum payment, whereupon he paid her the sum of 80*l.* to cover the four months September to December. Having returned to England, he sent her no more money, and the case against the appellant was that in January she came to this country, sought out the prosecutor, and threatened to expose him to his wife, and to the public by means of an announcement in a newspaper, unless he paid her the sum of 160*l.* forthwith. During one interview between them, the appellant's threats were overheard by a police officer, who had been within hearing as the result of an arrangement with the prosecutor. It appeared from the prosecutor's evidence that the appellant had suggested to him that they should attend before the Hungarian Consul or a lawyer in order that the agreement between them should be put in writing.

C. C. A.
1938
Rex
v.
Bernhard.

The appellant gave a somewhat different version of the conversations in which she was alleged to have threatened the prosecutor. That part of her evidence which is material on this appeal may be summarised as follows: She said that the prosecutor had agreed to pay her a sum which would cover all her expenses for a year, calculated at the rate of 20*l.* a month. At their parting he was to give her a cheque for as much as he could then afford, which turned out to be 80*l.* The balance of 160*l.* was to be paid in January, 1938. When she came to England in January she believed, according to her evidence, that she was entitled to 160*l.* and she stated that she had taken the advice of a Hungarian lawyer. It is true that there is at least one answer in her evidence which appears to be inconsistent with the plain declaration which she made elsewhere that the whole amount of 160*l.* was to be paid in January, but we have no doubt that there was material before the jury upon which they were entitled to find that the prosecutor promised to pay her, not by instalments of 20*l.*, but in two lump sums, the second payment of 160*l.* to be made in January.

Upon this evidence, the case made by defending counsel in his address to the jury was that the prosecution had failed to prove an " intent to steal," on the part of the appellant, in that it was not shown that she acted " fraudulently and "without a claim of right made in good faith."

Lord Hewart C.J., in summing up the case to the jury, read the material sections of the Larceny Act, 1916, and referred to the appellant's defence in these words: " To put "her case at the very highest does it come to more than this: "' As according to the bargain, which was an immoral bargain "' arising out of immorality, I was to have 20*l.* a month for "' the then succeeding eight months, I thought it would be a "' fair and decent thing on his part to pay me 160*l.* down in "' anticipation of eight months' instalments.' Well, whatever "else that may be, it is not a claim of right; it is not a claim "of anything which the law could recognise as a right and in "good faith." A little later the following passage occurs in the summing up: "Now I must direct you as a matter of "law that there cannot be a claim of right in good faith within "the meaning of s. 1 of the Larceny Act, 1916, so as to answer "an allegation of stealing if the claim is one arising out of an "immoral consideration and inconsistent with the terms "even of a bargain made for an immoral consideration. You "do not get anywhere near a claim of right." At the conclusion of the summing up the jury retired. Forty minutes later they returned, and a note was handed to Lord Hewart C.J. by the foreman of the jury, which was in these terms: "One "member of the jury, although sharing the view of the "remainder that the prisoner was guilty of endeavouring to "obtain money by threats, will not agree to a verdict of "guilty because he holds the opinion that she honestly "believed that the money claimed was due to her." Lord Hewart C.J. thereupon further directed the jury as to the meaning of the words, " a claim of right made in good fa[illegible] The substance of his further direction is contained in the following extract from the shorthand note: " In order that "that kind of excuse may arise, there must be two elements: "there must first of all be a claim of right, and secondly, a "claim of right made in good faith. Now, on the facts of this "case, on the admitted facts of this case, there cannot be a "claim of right. There might be a claim of wrong. The "bargain that was made was a bargain arising out of an "immoral consideration, and on any view of the matter that "bargain could not give a claim to the present payment in "January 1938 of something coming due month by month "up till August . . . . You cannot have a claim of right "where the circumstances are such as to exclude the possibility "of a legal claim." At the conclusion of this further direction the foreman of the jury put a question and was answered, according to the transcript of the shorthand note, as follows: "(The Foreman) I want your Lordship's guidance so that "this one juror should have his mind cleared. I understand "that his belief is that, if the prisoner thought she had a claim, "that would make a verdict of guilty of blackmail an incorrect "verdict. (Lord Hewart C.J.) No, I am much obliged to "you. That is the kind of fallacy with which I have been

C. C. A.
1938
Rex
v.
Bernhard.

"endeavouring to deal. If a person thinks two and two make "five, that gives rise to nothing except error. The question is "not whether she thought something or other. The question "is whether on the materials it was open to her to think she "had a real claim of right and made in good faith. In other "words, a person cannot make a right by thinking she has "one." The jury then conferred, and it appears from the shorthand note that while they were conferring, Lord Hewart C.J. added this observation: "I hope you understand, "members of the jury, that I am directing you in point of law "on these facts there could not be a claim of right in the "sense which is necessary. I direct you as a matter of law."

After this final direction, the foreman of the jury announced that the jury were agreed, and a verdict of guilty was returned.

1938. March 9. *J. C. Phipps* for the appellant. The learned judge misdirected the jury on the meaning of the words: "without a claim of right made in good faith" in s. 1 of the Larceny Act, 1916. Lord Hewart C.J. directed the jury that in order to establish a "claim of right made in good faith" within the section, the appellant must show that she actually had a claim maintainable in law, and that such a claim was made by her in good faith. He also said that she could not make something which was not a claim into a claim by believing that it constituted a claim. It is submitted, however, that an honest belief in a right to the money constitutes a good defence to a charge of stealing money, and that, if the appellant established that she honestly believed that she was entitled to the money which she demanded, and that, if she established that she was honestly asserting what she believed to be a lawful claim, she ought to have been acquitted. She had not acted "fraudulently and without a claim of right."

[He referred to *Rex* v. *Hall* (1); *Reg.* v. *Hemmings* (2); *Reg.* v. *Wade* (3); *Rex* v. *Clayton.* (4); Halsbury's Laws of

---

(1) (1828) 3 C. & P. 409.
(2) (1864) 4 F. & F. 50.
(3) (1869) 11 Cox, C. C. 549.
(4) (1920) 15 Cr. App. R. 45.

England, 2nd ed., vol. ix., p. 497; Stephens' History of the Criminal Law of England, vol. iii., p. 124; East's Pleas of the Crown, vol. ii., p. 659.]

The question whether the appellant, when she demanded money from the prosecutor, made the demand "fraudulently "and without a claim of right made in good faith," was not left to the jury. There was a dispute on the evidence whether the whole of the 160*l.* or only 20*l.* was payable to the appellant in January, 1938. That question ought to have been left to the jury as an issue of fact. It was not left to them. Further, it was not correct to say that the prosecutor's promise was made for an immoral consideration, because illicit relations between the parties had ceased at the time the agreement was made, and their renewal was not then in the contemplation of the parties. It was not correct to say that the bargain between the parties had no legal status. If the bargain was made for an immoral consideration, it was made in consideration of past immorality, and such a bargain is enforceable if made under seal.

G. G. Raphael for the Crown. A claim which has no foundation in law may in certain circumstances be a claim of right honestly believed in. Regard must be had to the circumstances in which the claim of right is advanced. The menaces used must bear some relation to the claim of right. Some support for the view adopted by Lord Hewart C.J. in the summing up is to be found in *Rex* v. *Dymond*. (1)

The Court intimated that the appeal would be allowed and the conviction quashed, and that judgment would be delivered at a later date.

1938. March 22. The judgment of the Court (Charles, Humphreys and du Parcq JJ.) was read by Charles J. [who stated the facts as set out above and said:] After hearing the questions arising on the appeal fully argued, and upon consideration of the relevant authorities, we were of opinion that Lord Hewart C.J.'s direction to the jury was erroneous in point of law, and that the conviction could not be allowed

(1) [1920] 2 K. B. 260.

to stand. We now proceed to state our reasons for this conclusion.

We agree with the view which is implicit in Lord Hewart C.J.'s direction to the jury that the words "with "intent to steal" in s. 30 must be construed with reference to the definition contained in s. 1 of the Act. The test is whether, if the money had been obtained, it would have been obtained in such circumstances that it could properly be said to have been stolen: see *Reg.* v. *Walton.* (1) It is as to the true construction of the words "fraudulently and without a claim "of right made in good faith" that we differ from the opinion of Lord Hewart C.J. If the matter were res integra there would no doubt be much to be said for the view which found favour with Lord Hewart C.J., that the words "claim of "right" cannot be read as including a claim which is unfounded in law. We are, however, bound by a long series of decisions, many before and one at least subsequent, to the Larceny Act, 1916, to hold that this view is incorrect, and that a person has a claim of right, within the meaning of the section, if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact. The material words in s. 1 of the Larceny Act, 1916, are declaratory of the common law, and a long and unbroken chain of authority supports this proposition.

The learned author of East's Pleas of the Crown dealing with the defence "That the goods were taken on a claim "of right," said: "And here it may be proper to remark, "that in any case if there be any fair pretence of property "or right in the prisoner, or if it be brought into doubt at all, "the Court will direct an acquittal." (East's Pleas of the Crown, vol. ii, p. 659.)

Mr. Phipps, in his able argument on behalf of the appellant, directed our attention to the following passage in Stephen's History of the Criminal Law of England, vol. iii., at p. 124: "Fraud is inconsistent with a claim of right made in good "faith to do the act complained of. A man who takes "possession of property which he really believes to be his own

(1) (1863) 9 Cox, C. C. 268.

"does not take it fraudulently, however unfounded his claim "may be. This, if not the only, is nearly the one case in "which ignorance of the law affects the legal character of "acts done under its influence." To the same effect is the statement of the law in para. 856 of the title "Criminal Law," Halsbury's Laws of England, 2nd ed., vol. ix., p. 497, contributed by, among others, the late Avory J.: "To "prevent the taking from being felonious, the claim of right "must be an honest one, though it may be unfounded in law "or in fact." Illustrations of the application of this principle, which we conceive to be firmly established in our law, are to be found in *Reg.* v. *Leppard* (1); *Reg.* v. *Wade* (2); *Rex* v. *Clayton.* (3) It follows in our judgment that the proper answer to the question which troubled at least one of the jury would have been that if the prisoner honestly thought that she had a claim, she was entitled to be acquitted, even though she was wrong in so thinking.

Further, we are of opinion that neither the nature of the consideration for the alleged bargain nor the evidence given as to the terms of that bargain, justified or supported the view which Lord Hewart C.J. so clearly expressed to the jury that the appellant's defence of a claim of right could not be maintained.

In our opinion, the agreement sworn to by the prosecutor was not made for an immoral consideration, inasmuch as illicit relations between the parties had ceased, and their renewal was not contemplated, at the time when it was made. It was unenforceable only because of want of consideration. The law is succinctly and correctly stated in Leake on Contracts, 8th ed., at p. 585: "A promise made in consideration "of the cessation of an illicit cohabitation, or in consideration "of past illicit cohabitation, or by way of compensation "for seduction, is void simply for want of consideration; so "that if made in the form of a bond or a covenant under seal, "there is prima facie a valid contract." Without attempting to cite all the relevant authorities, we may refer to *Nye* v.

---

(1) (1864) 4 F. & F. 51.
(2) 11 Cox, C. C. 549.
(3) 15 Cr. App. R. 45.

C. C. A.
1938
Rex
v.
Bernhard.

Moseley (1); *In re Vallance, Vallance* v. *Blagden* (2), and the observations of Farwell L.J. in *Hyams* v. *Stuart King.* (3) It is not without significance that a precedent for a "Deed of "Covenant securing annuity to a past mistress" is to be found in Key & Elphinstone's Precedents in Conveyancing (13th ed., vol. ii., at p. 491).

It is, we think, plainly impossible to found any argument against the existence in the appellant's mind of an honest belief in the justice and legality of her claim upon her failure to appreciate the distinction which an English lawyer would have drawn between the legal results of a parole agreement and an agreement under seal. It is indeed by no means clear that the validity of the agreement, which was made in France, should be held to depend on the law of England, but, as no evidence was called as to the French law applicable in such a case, it is impossible (as indeed it is unnecessary) for us to inquire whether according to French law the appellant might have maintained an action against the prosecutor.

It remains to deal with that part of Lord Hewart C.J.'s direction to the jury which was based on the view that, on the appellant's own showing, no more than 20*l.* was due to her from the prosecutor at the end of January, 1938. We have carefully examined the evidence, and as we have stated earlier in this judgment, we are of opinion that there was certainly some evidence that the prosecutor had promised to pay the balance of 160*l.* to the appellant in that month. Lord Hewart C.J. had the advantage of seeing and hearing the witnesses, and it may well be that he was right in the opinion which he undoubtedly formed that this evidence ought not to be accepted. But however strong, and however well justified, may be a judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury. If authority be needed for this proposition, it is to be found in *Reg.* v. *Farnborough.* (4) The judgment of Lord Russell of Killowen C.J., in that case makes it plain that even where the evidence on a charge of larceny is uncontradicted and appears to the presiding judge to be conclusive, the question whether the animus furandi has been proved should be left to the jury as one of fact. In the present case we are satisfied that there was sufficient evidence to justify a jury in finding that the appellant entertained an honest belief in her claim against the prosecutor.

---

(1) (1826) 6 B. & C. 133.
(2) (1884) 26 Ch. D. 353.
(3) [1908] 2 K. B. 696, 726.
(4) [1895] 2 Q. B. 484.

The learned counsel for the Crown suggested that some support for the view adopted in the summing-up might be found in the decision of this Court in *Rex* v. *Dymond.* (1) As to this it is enough to say that the Court was then dealing with different words in a different section, and that the judgment delivered by Lord Reading C.J. (2) made it clear that the question then before the Court was being determined solely by reference to the precise words of s. 29 of the Larceny Act, 1916.

The appeal is therefore allowed, and the conviction quashed.

Appeal allowed.

Solicitor for the appellant : *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown : *Director of Public Prosecutions.*

(1) [1920] 2 K. B. 260. (2) [1920] 2 K. B. at pp. 263 et seq.

T. W. M.

1938
March 28;
April 12.

HOUSE AND PROPERTY INVESTMENT COMPANY, LIMITED *v.* KNEEN (INSPECTOR OF TAXES).

Revenue—Income tax—Schedule A—Lease—Rack rent—Covenant by lessee to pay "further rent equal to insurance premium paid by "lessors"—Covenant by lessors to insure—Deductions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. I., Rule* 1; *No. IV., Rule* 10; *No. V., Rules* 7, 8.

The lease of premises, of which the appellant company was the lessor, provided that the rent should be (for the year 1936–7) 104*l.* per annum, and that the lessee should pay "a yearly sum "by way of further rent equal to the amount of an insurance "premium paid by the lessor." The insurance premium amounted to 1*l.* per annum and the annual value of the premises for income tax was assessed at 105*l.* (gross.)

The Commissioners confirmed the assessment and the company appealed, contending that the premium did not affect the annual value for purposes of tax, and that the assessment should have been 104*l.* only:—

Held, dismissing the appeal, that, since the lease referred to the premiums as rent, the Commissioners were entitled to take the premiums into account in arriving at the annual value, based on the rack rent within Sch. A, No. I., Rule 1 (2.), and, since Sch. A, No. V., Rule 8, deals expressly with the cost of insurance as a ground for claiming repayment of tax, the cost of insurance is also by implication included in the deductions allowed under No. V., Rule 7, and, if a landlord is entitled to deduct from the gross annual value a sum in respect of insurance, the gross annual value must include provision for insurance.

CASE stated under the Income Tax Act, 1918, s. 149.

At a meeting of the general commissioners of income tax for the division of Godley, in the county of Surrey, held on April 1, 1937, the appellants appealed against an assessment under Sch. A of the Income Tax Acts on No. 10, Petersham Buildings, Byfleet, in the county of Surrey, for the year 1936–37 in the sum of 105*l.* (gross).

The following facts were admitted or proved: No. 10, Petersham Buildings, Byfleet, was let under a lease dated March 4, 1929, between W. G. Tarrant of the one part and Frederick Hobbs of the other part for a term of fourteen years from March 8, 1929, at a rent of 100*l.* per annum for the first five years, 125*l.* for the sixth and seventh years, and 150*l*. for the remainder of the term, together with the yearly sum by way of further rent equal to the amount of an insurance premium paid by the lessor. The lease contained clauses that the landlords would insure against fire and for cesser of rent in case of fire. By an indorsement on the lease it was agreed that the rent of 150*l*. should as from Lady Day, 1936, be reduced to 104*l*. per annum. The lessee continued to be liable to pay the yearly sum by way of further rent referred to in the lease. The insurance premium amounted to (approximately) 1*l*. per annum. Since the granting of the lease the premises had been acquired by the appellants subject to the lease.

It was contended in support of the appeal that the gross assessment should be determined by reference to the rent of 104*l*. only, that the insurance premium borne by the lessee did not affect the annual value for income tax purposes, and that the insurance premium was not one of the "rates taxes "or other duties" referred to in the Income Tax Act, 1918, Sch. A, No. IV., Rule 10 (*b*). (1) The appellants had numerous

---

(1) Income Tax Act, 1918, Sch. A, provides as follows:—

Rules applicable to Sch. A.

No. I.: "In the case of all ". . . . hereditaments . . . . "capable of actual occupation ". . . . the annual value shall be "understood to be—(1.) The "amount of the rent by the year at "which they are let, if they are let "at rack rent . . . . (2.) If they "are not let at a rack rent . . . . "then the rack rent at which they "are worth to be let by the year."

No. IV., r. 10: "In making "any such assessment [i.e. of "annual value] regard shall be "had to—(*c*) any decrease in the "amount of the rent by reason of "any expenses incurred or to be "incurred by the tenant . . . . "whether mentioned or not in the "lease . . . ."

No. V., r. 7: "Where tax is "charged upon annual value . . . . "(*b*) In the case of an assessment "upon any house . . . . the "amount of the assessment shall ". . . . be reduced—(i) Where ". . . . the landlord undertook "to bear the cost of repairs . . . . "by a sum equal to one-sixth part "of that amount; and (ii) Where "a tenant . . . . undertook to "bear the cost of repairs, by such "a sum, not exceeding one-sixth "part of that amount, as may be "necessary to reduce it to the "amount of rent payable by him."

No. V., r. 8: "If the owner of "any land or houses to which "this rule applies shows that the "cost to him of maintenance, "repairs, insurance, and manage- "ment, according to the average "of the preceding five years, has "exceeded, ... in the case of "houses, one-sixth part of [the "annual value under this Sched- "ule] he shall be entitled in

1938

House and Property Investment Co. v. Kneen.

properties let on leases on similar terms to the present except that in most cases the insurance premium paid by the lessee was not referred to as an additional rent. *Turner* v. *Carlton* (1) was cited in support of these contentions.

For the Crown it was contended (inter alia) (1.) that the commissioners had to arrive at the annual value of the premises under Sch. A, No. I. (1); (2.) that in arriving at this determination it was necessary to take into account the yearly sum payable by way of further rent; (3.) that alternatively the said sum was an expense incurred by the tenant within the meaning of Sch. A, No. IV., Rule 10; (4.) that the assessment under appeal should be confirmed. (2)

The commissioners decided that the premium must be taken into account in arriving at the annual value of the property and confirmed the assessment in the sum of 105*l.* This case was stated at the request of the appellants for the opinion of the High Court.

J. S. Scrimgeour for the appellants. Tax under Sch. A is "charged in respect of the property in all lands, tenements, "hereditaments, and heritages in the United Kingdom, for "every twenty shillings of the annual value thereof"; and by General Rule No. I. the annual value shall be understood to be (1.) "The amount of the rent by the year at which "they are let, if they are let at rack rent and the amount "of that rent has been fixed by agreement commencing "within the period of seven years preceding the fifth day of "April next before the time of making the assessment." It is under that provision that the commissioners have purported to fix the annual value by reference to the lease.

[*Sir Terence O'Connor S.-G.* Technically the claim of the inspector that this was a No. I. (1.) case may have been wrong, and it may come under No. I. (2.), which says that if the premises are not let at a rack rent so fixed by agreement,

---

"addition to any reduction of the "assessment for the purposes of "collection, on making a claim for "the purpose, to repayment of the "amount of the tax on the "excess."

(1) [1909] 1 K. B. 932.

(2) See note (1), ante p. 275.

then the annual value is to be the rack rent at which they are "worth to be let by the year."]

The gross assessment under Sch. A, No. I., is determined by the annual value, and this in turn is determined by reference to the rack rent. The fact that the lessee has to repay the amount of insurance premium to the landlord "by way of "rent" does not affect the annual value for purposes of income tax. By Sch. A, No. IV., Rule 10 (*b*) regard is to be had to any decrease in rent by reason of any agreement by the tenant to discharge the landlord's "rates taxes assessments "or duties," but this does not include payment of insurance premiums. *Turner* v. *Carlton* (1) decides that the "annual "value" for the preceding year is conclusive, and Channell J. there expresses the view that, where the lessor covenants to pay the fire insurance premium, a deduction for the premium cannot be made by the landlord from the rent paid for the purpose of arriving at the annual value. If that view is right, the converse is equally true that the annual value is not increased where the tenant bears the cost of insurance; the repayment to the landlord "by way of rent" is merely a piece of machinery.

Insurance by itself is not a question bearing on the annual value. In the case of property in the occupation of the owner the amount of the assessment cannot possibly be affected by the question of the insurance premium or, indeed, by the question whether the property is insured at all. There is no reason to think this rent of 104*l*. is not a rack rent. The arrangement for bearing the cost of insurance is not an expense to be incurred by the tenant within the meaning of Rule 10 (*c*) of No. IV., and therefore in making the assessment regard should not be had to it. It is not suggested that the view of Channell J. in *Turner* v. *Carlton* (1) is binding on this Court, but if the landlord can show that the burden of insurance has fallen on him he can get some relief such as was being sought in *Turner* v. *Carlton* (1). If the tenant bears the burden, the landlord gets no relief. It would seem to follow that no extra tax, on account of insurance, would fall upon the landlord. Here payment of the premium is enforced by adding the amount to the rent. But nothing turns upon this and the result would be the same in substance and effect, (*a*) if the tenant entered into a covenant to insure, or (*b*) if the landlord entered into a covenant to insure and the tenant to repay the amount of the premium. It is a mere matter of arrangement, and the sum payable as further rent on account of insurance premium should have been excluded from the annual value. In the absence of provision in the lease to the contrary the tenant must pay the rent, whether the house is standing or not. Woodfall's Law of Landlord and Tenant (20th ed., p. 530) and judgment of Lord Atkinson in *Matthey* v. *Curling*. (1) The burden of insurance thus naturally falls upon the tenant.

---

(1) [1909] 1 K. B. 932.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the Crown (respondents). The annual value of the premises is fixed by Sch. A, No. I., Rule 1 (1.) as the " amount of the rent by the "year at which they are let if they are let at rack rent " or (2.) " the rack rent at which they are worth to be let " and the premises are rightly assessed at 105*l.* (gross). The opinion of Channell J. expressed in *Turner* v. *Carlton* (2) is in our favour. The landlord there sought to deduct the insurance premiums from the gross rent ; the commissioners agreed but Channell J. held that they were wrong. The lease itself is the best evidence of the rack rent on which the assessment is based under the Rules. But by No. IV., Rule 10, regard is to be had in making the assessment to (*c*) " any "decrease in the amount of rent by reason of any expenses "incurred " by the tenant. This refers to expenses which would otherwise be incurred by the landlord. By No. IV., Rule 9 (*b*), the assessment is not binding if the rent received is less than the rack rent on account of " repairs and improvements effected by "the tenants." There is no express reference to insurance, but it is not excluded : and regard may have to be paid to it under Rule 9 (*c*) by which, if the lease is made " with intent to "conceal " the annual value, the assessment is not binding. Where the landlord is required by the lease to provide the

(1) [1922] 2 A. C. 180.

(2) [1909] 1 K. B. 932.

house, then at common law certainly the obligation to insure falls upon him and not upon the tenant. The amount of the premium if it is to be paid by the tenant should thus form part of the assessment. For if the house is burnt down, performance becomes impossible and no rent is payable. Lord Atkinson's remarks as to this in *Matthey* v. *Curling* (1) are clearly obiter. The point was not dealt with by Lord Buckmaster and the other members of the House. Secondly, if the premium is excluded from the annual value, where it is to be paid by the lessee, the landlord will obtain a double benefit. For he is entitled to deduct the premium under No. V., Rules 7 and 8. It is true that Rule 7 only speaks of repairs, but in Rule 8 insurance is mentioned in conjunction with repairs as a ground for deduction if they exceed a certain proportion of the annual value. By implication therefore Rule 7 gives a right to deduction in respect of insurance premium in addition to repairs.

Scrimgeour in reply. This is not a case in which the rent is 105*l.*, less the amount of the insurance premium. That was dealt with in *Turner* v. *Carlton* (2) and No. V., Rule 8, was passed after the date of that decision, possibly to do away with the hardship thereby created. No. V., Rule 7, dealt only with deduction for repairs and the idea of insurance premiums was not then present to the framers of the rule, as being an allowable deduction. Here there is a lease at rack rent, 104*l.* and the onus of paying insurance premiums is placed on the lessee. In no case has the value of a covenant to insure on the part of the lessee been added to the rent reserved so as to increase the annual value. The matter is one of arrangement only between landlord and tenant.

Turner v. *Carlton* (2) is not against this view. It shows that, until 1910, the fact that the landlord was under liability to insure was not ground for disregarding the rent reserved in the lease in assessing the annual value. But it is not an authority for the proposition that the Commissioners are entitled to add to the annual value the premiums paid by the tenant. The only cases in which the cost of insurance affects

(1) [1922] 2 A. C. 180, 233 et seq.

(2) [1909] 1 K. B. 932.

the annual value are those which can be brought under No. V., Rule 8. There the owner is entitled to repayment, if he shows that the cost "to him" of insurance (inter alia) exceeds, in the case of houses, one-sixth of the annual value.

Cur. adv. vult.

1938. April 12. LAWRENCE J. read the following judgment: In this case the Commissioners have decided that the annual value of the appellants' premises for the purposes of Sch. A is the amount of the rent, notwithstanding that the rent includes a sum representing the premium for the insurance of the premises. The appellants contend that insurance is a matter which is altogether extraneous to annual value, that the annual value is the same no matter whether the premises are or are not insured, or by whom they are insured, and that here the sum payable as further rent on account of the premium of insurance should have been excluded from the annual value.

For the Crown it is contended in the first place that the lease in question provided for a rent of 104*l*. per annum and a further rent of 1*l*. per annum for insurance, and that the lease is the best evidence under Sch. A, No. I, Rule (2.), of the rack rent at which the premises are worth to be let, and, secondly, that if a premium of insurance is excluded from the annual value, where the lessee has agreed, as here, to pay the premium, the lessor will pay tax on the annual value, excluding the premium, and will also get a deduction on account of insurance under Rules 7 and 8 of Sch. A, No. V. The Solicitor-General also relied upon the expression of opinion of Channell J. in *Turner* v. *Carlton*. (1)

In my opinion, the Crown are right on both points. The particular lease in question refers to the premium of insurance as a further rent, and the Commissioners were entitled to treat it as evidence of the rack rent within Sch. A, No. I., Rule (2.). But apart from this consideration, the repairs allowance provided for by Rule 7 of Sch. A, No. V., must,

(1) [1909] 1 K. B. 932.

I think, be taken to include insurance, since Rule 8 deals expressly with insurance, and there can be no reason for allowing a claim under Rule 8, unless Rule 7 deals with the same subject-matter. It follows that the statute contemplates that the lessor is entitled to deduct from the gross annual value a sum in respect of insurance, and, if this is so, it cannot be that that annual value is not to include provision for insurance. The statute must, I think, be framed upon the view that rack rent is the full rent payable where the landlord bears a landlord's expense of maintenance, management, repairs, and insurance, from which rack rent the landlord is entitled to the deductions provided for by Rules 7 and 8 of No. V., or, if they are to be borne by the tenant, regard may be had thereto under Rule 10 (*c*) of No. IV. in arriving at the annual value.

I am therefore of opinion that the decision of the Commissioners was correct, and the appeal will be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Henry Gover & Son.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

F. P. F.

C. A.
1938
Jan. 12, 13.

PHILLIPS *v.* A. LLOYD AND SONS, LIMITED.

Practice—Action for damages for negligence and breach of statutory duty—Application by defendant for transfer of action to county court—Discretion of judge—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 46.

On an application to a judge of the High Court under the County Courts Act, 1934, s. 46, for the transfer of an action from that Court to the county court, the judge has a discretion to order either that the action shall or shall not be transferred; but, in exercising that discretion, he should have regard to all material considerations whether of fact or law, such, for example, as the amount of the damages which may be recovered in the action, the soundness of the defence, and the probability of difficult questions of law arising at the trial, and, if he fails to have due regard to any of these matters, the Court of Appeal has jurisdiction to overrule his discretion and set aside his order.

A girl aged sixteen employed in a factory at a wage of 18*s.* 6*d.* a week, while managing a machine in the course of her employment, had the thumb of her right hand cut off by the machine. She and her stepfather, a dock labourer, as her next friend and also on his own behalf, brought an action in the High Court against the proprietors of the factory for damages for alleged negligence and breach of statutory duty. The defendants denied negligence, and pleaded contributory negligence, volenti non fit injuria and common employment. There was some uncontradicted evidence tending to show that the defendants had been convicted of a statutory offence in respect of the fencing of the machine. On the application of the defendants the judge in Chambers made an order to transfer the action to the county court. On appeal to the Court of Appeal:—

Held, that the application raised for consideration important matters of both fact and law, that the judge in making the order to transfer the action had apparently exercised his discretion without having given due consideration to all these matters, and that his order should be set aside and the action retained in the High Court.

Stevens v. *Walker* [1936] 2 K. B. 215; and *Evans* v. *Bartlam* [1937] A. C. 473 considered and applied.

Culver v. *Beard* [1938] 2 K. B. 292, Note (see post p. 292) discussed and commented upon.

APPEAL from an order of Porter J.

Miss Annie Catherine Phillips, aged sixteen, hereinafter called " the infant plaintiff," was employed under a contract of service by Messrs. A. Lloyd & Sons, hereinafter called " the "defendants," tin box makers, at their factory, at a wage of 18*s*. 6*d*. a week.

On March 22, 1937, in the course of her employment, she was operating a power press when her hand was caught in the machine and in consequence she suffered personal injuries.

On October 12, 1937, the infant plaintiff, by her stepfather and next friend, Charles Frederick Kluth, a dock labourer, and the said C. F. Kluth, hereinafter called "the "adult plaintiff," brought the present action in the High Court against the defendants, claiming damages for personal injuries to the infant plaintiff.

The plaintiffs in their statement of claim alleged (para. 1), that the injuries were caused owing to the negligence of and breach of statutory duty by the defendants; the particulars being that the power press was in an unfenced and dangerous state; (para. 2) that the power press was a dangerous part of the machinery used by the defendants at their factory and ought, pursuant to s. 10 of the Factory and Workshop Act, 1901, to have been securely fenced, but owing to the negligence of and breach of statutory duty by the defendants, it was not fenced, or was fenced in an insecure and dangerous manner, and in consequence the infant plaintiff was caught in it and thereby she sustained serious personal injuries; and (para. 3) that the defendants were also negligent in that (*a*) they ordered or caused the infant plaintiff to operate the power press when they knew or would but for their negligence have known that it was not securely fenced, (*b*) they failed to fix and to supply safe or proper fences on the power press, (*c*) they failed to give the infant plaintiff any or any adequate instructions as to the proper method of operating the power press, and to exercise any proper supervision over the working thereof; the particulars of the injuries being injuries to right hand necessitating amputation of right thumb, and shock, and the particulars of loss and expense being loss of wages at 18*s*. 6*d*. per week from date of accident, and hospital and doctor's account; and the plaintiffs claimed damages.

The defendants, in their defence, stated that they admitted that an accident occurred to the infant plaintiff while she

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

was employed in their factory, but, save as aforesaid, they denied every allegation in the statement of claim; and they alleged that, if they were negligent or committed any breach of statutory duty, the infant plaintiff was guilty of contributory negligence; that she voluntarily undertook the risk of an accident happening; and that the negligence, if any, was that of a servant in common employment with the infant plaintiff.

A medical report by Dr. Cecil Malley, F.R.C.S., dated June 30, 1937, concluded as follows: "This girl has lost "the greater part of her right thumb—the wounds on her "hand have healed, however the scars are still very tender. "It is possible that she may need a re-amputation if this "tenderness does not disappear. She will be left with a "permanent weak hand."

A medical report by Dr. J. I. O'Sullivan, M.B., concluded with the following statement: "She has suffered the loss "of the right thumb and is left with a tender and hyper-"sensitive stump which is not adequately covered with soft "tissues. If the tenderness and undue sensitivity do not "subside in a few months, it might be advisable to excise the "small portion of the proximal phalanx so as to cover the "stump more adequately with soft tissues. The effect of the "amputation is twofold: (1.) It impairs the use of the hand "considerably so as to render her unfit for most forms of "manual work, especially for finer work requiring the use of "the finger tips and thumb, and, even for such work as she "can do, she will be slower, clumsier and less efficient than a "normal person, while if observed by a prospective employer "(and in most factories, etc., nowadays inspection of the "hands is carried out) it is sufficient to cause her rejection. "(2.) It gives rise from the mutilated appearance of the hand "to a considerable degree of permanent disfigurement."

On October 29, 1937, the defendants made an application under the County Courts Act, 1934, s. 46 (1), to the High

---

(1) County Courts Act, 1934, Sect. 46: "(1.) Where any "action founded on tort is com-"menced in the High Court, the "defendant may, on an affidavit "made by himself or by any

Court or a judge thereof to have the action transferred to the county court, alleging that the plaintiffs had no visible means of paying the costs of the defendants in the High Court, should a verdict not be found in the plaintiffs' favour.

The application was supported by an affidavit dated October 20, 1937, by Mr. P. W. Rowe, an inquiry agent employed on behalf of the defendants, in which he stated in effect that his inquiries went to show that the adult plaintiff was a casual dock labourer earning on the average about *2l.* 10*s.* per week and having no other means, that his wife and three children, including the infant plaintiff, were dependent on his earnings, that the plaintiffs occupied a three-roomed tenement at a rental of 8*s.* 9*d.* per week, and that from the deponent's information and observation he said that the plaintiffs had no visible means of paying High Court costs should judgment be given against them.

On behalf of the plaintiffs an affidavit was read, dated October 27, 1937, by the adult plaintiff, in which he stated that he had resided at his present address for four years, that he had furniture and effects there valued at between 50*l.* and 75*l.*, that he was a dock labourer and had been with the same employers for the past thirteen years, that his average earnings were 4*l.* 18*s.* 6*d.* per week and bonuses, that at busy periods, which occurred frequently, he earned in excess of 8*l.* per week, that it was not true to say that he had no means. That affidavit then continued as follows: "the injuries to my step-daughter are of a serious nature

---

"person on his behalf showing "that the plaintiff has no visible "means of paying the costs of the "defendant should a verdict not "be found for the plaintiff, apply "to the High Court or a judge "thereof for an order to transfer "the action to a county court.

"(2) On any such application, "the High Court or judge, unless "the plaintiff satisfies the Court "or judge that he has such means "as aforesaid, may, if the Court "or judge having regard to all the "circumstances of the case thinks "fit so to do, make an order that, "unless the plaintiff within a time "to be limited in the order gives "security for the defendant's costs "to the satisfaction of the Court "or a judge, the action shall be "transferred to such county court, "to be named in the order, as the "Court or judge may deem the "most convenient to the parties."

"involving the amputation of the thumb of the right hand "at its junction with the palm of the hand. My step-daughter "is right-handed and I am informed by her and I verily "believe that she is now an odd lot in the labour market, "and her earning capacity is permanently and considerably "reduced. In my respectful submission my case is one more "fit to be tried in the High Court than the county court, and "one fit to be tried by a jury."

On December 7, 1937, on the hearing of the application, Porter J. made an order transferring the case to the county court.

The plaintiffs appealed.

Hector Hughes K.C. and *M. O'Sullivan* for the plaintiffs, appellants.

It is submitted that Porter J. was wrong in making an order transferring this action to the county court.

Under the County Courts Act, 1934, s. 46 (1), a judge of the High Court has, no doubt, a discretion, if he thinks fit, to make an order transferring an action brought in that Court to the county court. In exercising his discretion the judge must, however, have due regard to all relevant matters of importance, both of fact and law, such as the amount of the claim, the probability that the defence may or may not be successful, and the likelihood that difficult questions of law may or may not arise for consideration, and if he exercises his discretion and makes an order without having had regard to all these matters, the Court of Appeal has jurisdiction to set aside his order, and to exercise its own discretion in regard to the question of transfer: see the judgments of Lord Wright M.R., Romer L.J. and Charles J. in *Stevens* v. *Walker*. (2) The fact that in all the circumstances of the present case the judge has made an order transferring the action to the county court sufficiently shows that he has exercised his discretion without due regard to the matters which he ought to have considered and his order ought therefore to be set aside and the action retained in the High Court.

(1) See note (1), ante p. 284.

(2) [1936] 2 K. B. 215.

C. A.
1938

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

Gilbert J. Paull for the defendants, respondents. The learned judge was right in making the order appealed from. The discretion given to the judge by the County Courts Act, 1934, s. 46 is an unfettered discretion which should never as a rule be interfered with: *Culver* v. *Beard* (1). The case of *Stevens* v. *Walker* (2) only decided that the discretion of the judge may be overruled where it can be clearly shown that no sufficient material was available for the exercise of his discretion in the way in which he has exercised it.

[Scott L.J. The principle of that case was approved and enforced by the House of Lords in *Evans* v. *Bartlam* (3).]

Here there is no evidence to support the view that the judge had not considered all the matters which he should have considered before deciding in the exercise of his discretion to transfer the action to the county court. The mere fact that in a case of this kind the plaintiff's injuries are severe, and the damages, if any, likely to be considerable, is not in itself a reason for overruling the judge's order to transfer. It does not appear that the defendants have not a good defence to the action. The plea of contributory negligence is a good answer to an action for damages for negligence and breach of statutory duty. That defence no doubt involves a question of law, but it is not a difficult question of law, and no other difficult question of law is likely to arise in the action.

No reply was called for.

GREER L.J. In this case the question arises whether the material before the learned judge was sufficient, and adequately considered by him, when he dealt with the question whether the action should be transferred to the county court, a question which prima facie was within his discretion. In the course of the judgment in *Culver* v. *Beard* (1), to which our attention has been called in a vigorous argument by Mr. Paull, I expressed the view that in all these cases the discretion was left by statute to the learned judge in Chambers, provided that he had regard to all questions of importance, and the Court had no power to interfere with that discretion. The matter was considered in a case of *Stevens* v. *Walker* (1) which came before the other branch of the Court. After it had been considered in that case, all the members of this Court had a consultation, as a result of which it was determined that both branches of the Court should act upon the same principle, of which *Stevens* v. *Walker* (1) is an example, namely, upon the principle that where we come to the conclusion that the learned judge has not given adequate weight to the considerations that ought to weigh with him, then the Court may exercise their own discretion and reverse the order made by the learned judge.

---

(1) [1938] 2 K. B. 292, Note (see post, p. 292).

(2) [1936] 2 K. B. 215.

(3) [1937] A. C. 473.

That principle, I think, is emphasized by the decision of the House of Lords in the case to which Scott L.J. referred, namely, *Evans* v. *Bartlam.* (2) I need not read the passages which have already been read, but I think they amount to the view that the House of Lords, who came to the conclusion that my view was right upon the facts of that particular case, also quite definitely and without hesitation came to the conclusion that the reasons I had given, which were the same that I gave in the case of *Culver* v. *Beard* (3), were not to be followed.

In those circumstances, I think it is clear that in the present case we are entitled to come to the conclusion that the learned judge had not adequately considered the seriousness of the importance of the claim for damages, and I regard my decision in the case of *Culver* v. *Beard* (3) as not really inconsistent with this conclusion. I find it impossible in this case to say that because we differ from the view which the learned judge took, and we do so differ, that we should not therefore allow the appeal and set aside the order of the learned judge where the statute says that the power of making the order is a power which is vested in the judge provided that he considers all the circumstances of the case. I think there is another reason. The judgment of Slesser L.J. in *Culver* v. *Beard* (3) must be interpreted in the same way, and the words at the end of the second paragraph of that judgment must be read as meaning :

(1) [1936] 2 K. B. 215.
(2) [1937] A. C. 473.
(3) [1938] 2 K. B. 292, Note (see post, p. 292).

C. A.
1938

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

Greer L.J.

"The learned judge must have sufficient regard to any matters "which he ought to have regard to, or must take into con- "sideration matters which he ought to have taken into "consideration." Then the decision of Romer L.J. in the earlier case of *Stevens* v. *Walker* (1) shows that in his view one of the matters to be taken into consideration is whether or not questions of law which may be of some importance have to be considered. If we come to the conclusion, as we do, that there may be difficult questions of law involved in this case as well as difficult questions of fact as to the amount of damage which the Court should order, I think we can come to the conclusion that we are entitled to reverse the order of the learned judge, having regard to the fact that he did not give sufficient weight to the consideration of the amount of injury suffered by this poor girl and also that he did not give sufficient weight to the questions of law which would necessarily arise.

For those reasons we think that this appeal should be allowed.

SLESSER L.J. I agree.

On all the three grounds which were mentioned in the case of *Stevens* v. *Walker* (1) by Lord Wright M.R. and Romer L.J. and there may well be others, I think the plaintiff here should be allowed to have her action brought in the High Court. The three grounds to which I refer are, first, that it appears that the damage claimed may be of a considerable amount; secondly, that there is a probability that the defendants will not have a substantial defence; and thirdly, that, if the defendants have a substantial defence, that defence will almost of necessity involve difficult questions of law.

As to the first point, it is conceded that this unfortunate girl lost the whole of the thumb on her right hand, a disability which is certainly likely to render her at any rate very seriously prejudiced as a wage-earner for the whole of her life.

As to the second question, with regard to the possibility of a substantial defence, a statement is made in an affidavit sworn in this case to the effect that the defendants, being charged in the police court with a breach of statutory duty

---

(1) [1936] 2 K. B. 215.

C. A.
1938

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

Slesser L.J.

under the Factory Acts, have already been fined and convicted for that breach. That, of course, possibly will not be evidence, certainly not conclusive evidence, at the trial; but, in considering whether there is a probability of a defence on the point that no such breach was committed, it is material to notice that that affidavit has not been contradicted.

The third point is raised by Mr. Paull in para. 2 of the defence, where he says that, if the defendants were negligent or committed any breach of statutory duty, the infant plaintiff was guilty of contributory negligence. Nobody knows better than does Mr. Paull that, if a breach has been committed, that plea raises, in the present state of the authorities, a difficult question of law, and, as Romer L.J. stated in the case of *Stevens* v. *Walker* (1), and as I ventured to say in the case of *Culver* v. *Beard* (2), one of the reasons for keeping the case in the High Court may be because of the difficult legal problems involved in the case.

For all these reasons I agree with my Lord, and would only add this, that I also wish to associate myself with him when he says that in dealing with these cases this Court will now find it is bound by the decision in the case of *Stevens* v. *Walker* (1) rather than in the case of *Culver* v. *Beard* (2) where there is any discrepancy between them, and that the case of *Evans* v. *Bartlam* (3) has assisted us to come to a conclusion at which we had already arrived, namely, that the discretion which the learned judge has is of a nature cognizable in this Court as stated by Lord Atkin in that case. (4)

SCOTT L.J. I agree with both judgments which have been given and with the reasoning of each of them.

I should like, however, to add a word or two on the facts of the case. The stepfather, who is the person appearing on behalf of the infant plaintiff as next friend, says in his affidavit that the injuries to his stepdaughter are of a serious nature, involving the amputation of the thumb of the right hand at its junction with the palm of the hand; that his stepdaughter is

(1) [1936] 2 K. B. 215.
(2) [1938] 2 K. B. 292, Note (see post, p. 292).
(3) [1937] A. C. 473.
(4) Ibid. 480.

right-handed, and that he is informed by her and verily believes that she is now an odd lot in the labour market, and that her earning capacity is permanently and considerably reduced; and that in his submission the case is one more fit to be tried in the High Court than the county court and one fit to be tried by a jury. Then the doctors who examined the infant plaintiff make statements regarding the nature and effects of her injuries. Dr. Cecil Malley, who is a Fellow of the Royal College of Surgeons, says that she has lost the greater part of her right thumb; that though the wounds on her hand have healed, the scars are still very tender; that it is possible that she may need a re-amputation if this tenderness does not disappear; and that she will be left with a permanent weak hand. Dr. J. I. O'Sullivan, who is a Bachelor of Medicine, says that the effect of the amputation is two-fold: that it impairs the use of the hand considerably so as to render her unfit for most forms of manual work, especially for finer work requiring the use of the finger tips and thumb, and that even for such work as she can do she will be slower, clumsier and less efficient than a normal person, while if observed by a prospective employer (and in most factories nowadays inspection of the hands is carried out) it is sufficient to cause her rejection; and that it gives rise from the mutilated appearance of the hand, to a considerable degree of permanent disfigurement. It is quite clear that she is injured seriously in the labour market, and, if one may take a human view, is also probably injured as a prospective housewife.

Those facts are such as to make this case a suitable one for the High Court, unless there are other reasons, which in my opinion are not present here, why the case ought to go to the county court. There may be exceptional cases of this kind which ought to go to the county court. I cannot conceive of one at the moment, but I keep the possibility of its occurrence open, lest on some future occasion some such case may be brought before us.

GREER L.J. I should like to add that the statement in the affidavit of the stepfather that he cannot get a jury in the

C. A.
1938

Phillips
v.
A. Lloyd
& Sons,
Ld.

county court is mistaken. He can get a jury there, but the granting of one is discretionary.

Appeal allowed.

Solicitors for appellants : *Churchill & Co.*

Solicitors for respondents : *James Turner & Son.*

J. R.

NOTE.

COURT OF APPEAL.

January 11, 12, 1937.

CULVER (AN INFANT) v. BEARD AND OTHERS.

Practice—Action for damages for personal injuries—Alleged negligence of defendant—Application to transfer action to county court—Discretion of judge—County Courts Act, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 2.

Appeal from an order of Horridge J.

On April 26, 1933, Miss Jean Sylvia Culver, hereinafter called "the first plaintiff," while crossing the Southend Arterial Road at Laindon in the county of Essex, was struck and knocked down by a car driven by Allan Beard, hereinafter called " the first defendant," while in the employment of Car Mart, Ld., hereinafter called "the second defendants," to whom the car belonged.

On March 28, 1936, the first plaintiff, by Archibald Ralph Thornlie, her next friend, and Iris Sylvia Culver, hereinafter called " the second "plaintiff," wife of Harry Smith Culver, brought an action against the defendants claiming damages for personal injuries to the first plaintiff, and consequential loss to the second plaintiff. The plaintiffs had leave to sue as poor persons.

The plaintiffs, in their statement of claim, alleged (para. 3) that the first-named plaintiff had suffered damage from personal injury, and the second-named plaintiff had been put to expense, by reason of the negligent driving of a motor-car by the first defendant ; (para. 4) that the first defendant drove, managed and controlled the said motor-car so negligently and unskilfully that he caused or permitted it to strike the first plaintiff and knock her down ; the particulars of negligence being that he drove at excessive speed without keeping a proper look out or giving sufficient warning of approach, and that he failed either to apply his brakes sufficiently or to turn aside to avoid striking the first plaintiff ; (para. 5) that as a result of the negligence, the first plaintiff had sustained personal injuries and endured much pain and suffering ; the particulars of injury being (inter alia) fractures of the left tibia and fibula, a badly cut right

C. A.
1938

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

thigh, injuries to the left foot, with various other bruises and scars, and permanent weakness in standing and walking; and the second-named plaintiff had incurred expense and suffered loss in the form of fares, doctor's fees, damage to clothes and loss of wages, amounting together to 9*l.* 4*s.* 6*d.* And the plaintiffs claimed damages.

The defendants, in their defence, stated: (para. 1) that they denied that the first defendant was guilty of the alleged or any negligence; (para. 2) that the collision between the second defendant's vehicle and the first plaintiff was caused solely by the negligence of the first plaintiff; the particulars being that she ran from the pavement into the path of the second defendants' approaching vehicle without keeping proper look out and failed to give the first defendant any sufficient opportunity to avoid the collision; and (para. 3) that they denied that the plaintiffs or either of them had suffered the alleged injuries, loss or damage.

On October 20, 1936, Horridge J. made an order that, unless the plaintiffs, within seven days from the date of the order, gave security in the sum of 25*l.* for the defendants' costs, the action should be transferred to the Bloomsbury county court.

On November 7, 1936, the plaintiffs gave notice of appeal that the order of Horridge J. might be reversed.

The application was supported on the appeal by an affidavit going to show that the injuries to the first plaintiff would result in permanent incapacity which might affect her future earning capacity.

E. Howard for the plaintiffs, appellants.

W. A. Fearnley-Whittingstall for the defendants, respondents.

GREER L.J. This is an appeal from an order made by the learned judge in charge of the new procedure list made on a summons for directions under the powers which are granted to him by s. 2 of the County Courts Act, 1919. The action was brought for personal injuries occasioned by negligence for which the defendant was responsible. There was a statement of claim, and so far as the matter is before this Court it is now supported by an affidavit showing that there were reasonable grounds for the allegation that the injuries to the plaintiff would result in permanent disablement which might affect her earning capacity in the future.

In those circumstances the matter came before the learned judge who had to exercise the powers which are given to him by the section to which I have referred, which is in these terms: " In any action "founded on tort commenced in the High Court the defendant may, "on an affidavit made by himself or by any person on his behalf "showing that the plaintiff has no visible means of paying the costs "of the defendant should a verdict not be found for the plaintiff, "apply to the Court or a judge for an order to transfer the action "to a county court; and thereupon the court or judge, unless the "plaintiff satisfies the court or judge that he has such means, may, if "the court or judge having regard to all the circumstances of the "case thinks fit so to do, make an order that unless the plaintiff within "a time to be limited in the order gives security for the defendant's "costs to the satisfaction of the court or a judge the action shall be "transferred to such county court to be named in the order as the "court or judge may deem the most convenient to the parties." In my judgment the words of that section make it perfectly clear that if the learned judge considers all the circumstances of the case it is left by statute to his discretion to say that the case is one which ought to be transferred to the county court. That being the position, I think it is clear now, whatever may have been the case at one time or another, that having regard to the speeches of their Lordships in the case of *Campbell* (*Donald*) *&* *Co.* v. *Pollak* (1), to which Slesser L.J. has referred, the discretion is one to be exercised by the judge to whom it is given. "Court or judge" means the Court or judge to whom the application is made, either the master or the judge on appeal from the master, and where the summons is taken in new procedure cases by the judge without first going before the master, "Court or "judge" means the judge who hears the application, and does not mean the Court of Appeal. I am rather inclined to the view that if this matter had come before me as the Court or judge, I should have said that the injuries were so serious in this case that, the ordinary practice of county court judges being to deal with matters of comparatively small monetary interest, it would have been better to leave the case in the High Court and not to remit it to the county court. But that is not a matter, in my judgment, which this Court is entitled to take into consideration for the purpose of overruling the discretion of the learned judge who took the other view, if he did take the other view. What was before him? On the first occasion on which the summons came before him his attention was called to the nature of the action as shown by the statement of claim in order that he might consider whether this was a case where there were very serious injuries alleged by the plaintiff, and also to a defence which had been put in. The learned judge had before him the claim that was made, and we have before us that claim supported by affidavit. In those circumstances I find it impossible at the present day to say that because we differ from the view that the learned judge took, if we do so differ, we should therefore allow the appeal and make an order overruling his order when the statute has said that the power of making the order is a power which is vested in the judge, provided he considers all the circumstances of the case.

Now there have been decisions which are not irrelevant for us to consider. At first sight, until we read the exact words of the section, it looked as if there was provision for an alternative order, an order either for a remission to the county court, or for security for costs. But when one reads the words of the section it quite clearly does not provide for anything of the kind, but for an order for remission which can be avoided if the plaintiff gives security. It provides not for an order that he shall give security, but for an order that if he does not do so the case may be remitted to the county court. It would be impossible to say that the section means that an order cannot be made under the section except in cases in which an order could be made for security for costs, because the effect of that would be that an order for remission could never be made in a poor person's case, since it would always be said, in any such case, that as an order for security for costs cannot be made, neither can an order be made to remit to the county court. That would leave the defendants at the absolute mercy of plaintiffs who were suing as poor persons. I think it is quite clear that that cannot be, and is not, the meaning of the section. In addition to that it has been decided by the Court of Appeal in the case of *Cook* v. *Imperial Tobacco Company* (1) that an order may be made under this section for remission to the county court, and from the words of the section the order must be in the form provided by the section—namely, that if the plaintiff fails to give security then there shall be an order remitting to the county court. I think that applies where the action is brought by a plaintiff who has obtained a certificate to sue as a poor person as well as in other cases, though at first sight I was rather inclined to take the other view. It is said that it was undoubtedly decided in the case of *Bottomley* v. *F. W. Woolworth & Co., Ld.* (2) that an order for security against a person suing as a poor person cannot be made, and that if made it has no effect and ought to be set aside. For the reasons I have given that case does not seem to have any bearing on the question we have to decide.

---

(1) [1927] A. C. 732.

Our attention was called to several cases in support of the appeal, one being the recent case of *Stevens* v. *Walker* (3). If the judgments in that case are carefully examined I think it will be found that what the learned judges of the Court of Appeal were there considering was whether they could reverse the order of the learned judge because he had not given any real consideration to the questions which he ought to have considered, one question being the seriousness of the claim which was being put forward by the plaintiff, and the other being the question whether there was really any defence to the action. Those are questions which he was bound to consider, and as he had not considered them, the Court of Appeal came to the conclusion that they were entitled to interfere with his order, because by not considering those questions he had gone wrong in principle.

It is extremely difficult in an appeal from the order of a judge upon a summons to ascertain really what he has considered. But we have this material in the present case, that when the summons first came on it was urged on the learned judge by counsel for the plaintiff that he ought not to make this order because a very serious case was alleged by the plaintiff, and presumably alleged with some chance of success, though the negligence on the part of the defendant was denied in the defence. How are we in this Court to say that the learned judge attached no weight to that argument, that he did not consider it at all, and that we are therefore entitled to interfere with the exercise of his discretion by reason of the fact that he did not really consider the matter. I should not think it would be enough to upset the learned judge's decision merely to say that the matter was mentioned at some time or other, and that he said nothing about it. It must

(1) [1922] 2 K. B. 158, 162.
(2) [1932] W. N. 115.
(3) [1936] 2 K. B. 215.

C. A.
1938
Phillips v. A. Lloyd & Sons, Ld.
Greer L.J.

be shown that there was no real consideration of the questions which are the determining questions, and of all the circumstances of the case. I find myself unable to say that the learned judge in the present case did not consider the circumstances which were urged before him as reasons why he should not remit this case to the county court. I am not therefore satisfied by the argument that in the present case the learned judge exercised his discretion upon wrong principles.

Our attention has been called to two earlier cases which, though not upon the construction of the same statute, are upon statutory provisions in pari materia with s. 2 of the County Courts Act, 1919. The first was the case of *Farrer* v. *Lowe & Co.* (1) That was a decision of the Divisional Court. It may mean that the judges in that case were not satisfied that the point as to the seriousness of the allegations made by the plaintiff had not been really considered by the learned judge; or, on the other hand, it may be, in view of the way in which the question of discretion has been dealt with in recent years, that the case is no longer binding upon this Court. The same observations I think apply to the other case which was cited, of *Owens* v. *Woosman* (2), with this addition, that in that case, inasmuch as the Court thought full consideration had been given to the matter, and did not set aside the order of the Court below, the observations as to what they would have done in other circumstances seem to me to be obiter and not binding upon this Court. In any event the considerations which apply to the Divisional Court decision in *Farrer's* case (1) apply equally to the considerations of the reasons for the decision in the case of *Owens* v. *Woosman*. (2)

Though I have said what I had to say, I do not wish for one moment to throw any doubt upon the proposition that great care ought to be exercised by a judge in Chambers, or by a judge in charge of the new procedure list, in exercising the discretion which is conferred upon him by statute. It does not follow that, because the plaintiff is a person without means, or of insufficient means, there should of necessity be an order to remit the case to the county court. There are many cases where it is right to say that the allegations are so serious, and the questions involved so full of difficulty, that the case is one which ought to remain in the High Court notwithstanding the additional burden as to costs which may be put upon a defendant who ex hypothesi has some chance of succeeding in the action.

For the reasons I have given I have come to the conclusion that this appeal should be dismissed with such costs, if any, as a defendant is entitled to recover against a poor person.

Slesser L.J. In this action, founded upon tort, there is no question that the infant plaintiff, and the other plaintiff, are persons without visible means of paying the costs of the defendant should a verdict not be found for the plaintiff. In those circumstances, by reason of s. 2 of the County Courts Act, 1919, the Court or judge may, having regard to all the circumstances of the case, if they think fit so to do, make an order, unless the plaintiff within a time to be limited in

(1) (1889) 5 Times L. R. 234. (2) (1868) L. R. 3 Q. B. 469.

the order gives security for the defendant's costs to the satisfaction of the Court or judge, to transfer the action to the county court. That power on the face of it is a discretion vested in the judge before whom the matter is brought on an application for transfer, and I wish to adopt the language of Lord Wright M.R. as reported in the case of *Stevens* v. *Walker* (1), where he said: "I feel very strongly that the discretion "in these very serious personal accident cases should be exercised "with very great care," a view which has been repeated by my Lord in the chair this morning. But while it is necessary on an application to transfer to proceed with great care, and while it should fully be recognized by judges exercising that discretion that there are many cases where justice requires that the case should remain in the High Court, nevertheless there remains by statute a discretion in the judge which can only be disturbed in the higher court on the recognized principles, and on its being shown by the appellant complaining of the exercise of this discretion that the learned judge has done something which he ought not legally to do, so that in effect he has not been exercising a judicial discretion at all.

Various matters have been indicated in the case of *Stevens* v. *Walker* (1), and others may be found hereafter, to which the learned judge should have regard and which in a particular case he may have failed to have regard to, such as, for example, that the action is practically undefended; or that the claim on the face of it would be well above the normal county court jurisdiction; or thirdly, that difficult legal problems may be involved in the case which make it appropriate to be considered in the High Court. But when we come to consider the present case, in my view, agreeing with my Lord, it is quite impossible to say that this learned judge has failed to have regard to any matters which he ought to have had regard to, or has taken into consideration matters which he ought not to have taken into consideration.

What are the facts of this case? It came before the learned judge on a summons in the new procedure list for transfer to the county court. There was placed before him a statement of claim containing the allegations of the negligence, and of the injuries. I am far from expressing any opinion as to whether they are correct or not; that will have to be determined at the trial. But they are stated certainly in such a form as to indicate that they allege very serious negligence and injuries. He had also before him a defence which not only asserts that the collision was caused by the negligence of the infant plaintiff, but in terms denies, in para. 3, that the plaintiffs, or either of them, have suffered the alleged injury, loss or damage. So on the face of it this is clearly a case which is fully defended.

Next, Mr. Howard, as counsel for the plaintiff, takes a point against the transference. That point is not that his client has no visible means of paying the costs which it would be impossible for him to do owing to the fact that the client appears in the guise of a poor person, though he formally asks that there shall be an affidavit to corroborate the assertion that the plaintiff cannot pay the costs. The point taken on behalf of the plaintiff and urged as an objection before the learned

---

(1) [1936] 2 K. B. 215, 223.

C. A.
1938
PHILLIPS
v.
A. LLOYD & SONS, LD.
Slesser L.J.

judge is that there should not be a transfer because the injuries to the first plaintiff were serious. Therefore the learned judge had before him the pleadings and the objection that this was not a proper case for transfer because of the seriousness of the injuries. I do not know what other matters might have been urged before the learned judge. If there were any, Mr. Howard in his discretion did not mention them. Having regard to that fact the judge on the second hearing made up his mind that he would order the transfer. How can we, sitting in this Court, say that he has failed to have regard to the matters which Mr. Howard urged before him? It would be a poor compliment to Mr. Howard that the judge did not give to his no doubt very persuasive arguments all the weight they deserved. We have heard him with very great interest, and, if I may say so, he appears to be fully competent to express his opinion on any point. I have no reason to assume that the learned judge had not before him the facts in the pleadings and Mr. Howard's contention that these injuries were serious. Nevertheless he made this order for transfer. In my view it is not possible to say that any of the grounds which existed in the case of *Stevens* v. *Walker* (1) or, indeed, any other grounds, have impinged his discretion.

The only other matter which remained, and which Mr. Howard was reluctant to take before this Court, and I think now we have examined the matter we know why he was so reluctant, is the fact that owing to the difficulty of the decision in the case of *Bottomley* v. *F. W. Woolworth & Co., Ld.* (2) an order for security for costs cannot be made in the High Court in respect of a poor person. But, as my Lord has pointed out, this section does not require the Court to order security for costs, or give it power so to do; it merely gives the Court power to order that a case may be remitted to the county court, unless the plaintiff within a time limited in the order gives security. However that may be, so far as I understand the authorities, the question is put at rest by the decision of this Court in *Cook* v. *Imperial Tobacco Co.* (3), where Bankes L.J., speaking of *Perry's* case (4), uses the following language: "The case however stands as a clear authority, and binding "upon this Court, that a master or a judge when dealing with an application to transfer an action to the county court has a full discretion "to make the order for transfer, even though the applicant may already "have obtained an order entitling him to sue in forma pauperis in "the High Court." That view is accepted by the rest of this Court in *Cook* v. *Imperial Tobacco Co.* (3), and is binding upon us. It follows that by the absence of any reason to show that the learned judge has not properly exercised his discretion, and the failure to show that there is any impropriety in making an order for the poor person, this appeal must fail with the consequences stated by my Lord.

SCOTT L.J. I agree, and only add two observations. The first is that it is an assumption of s. 2 of the Act of 1919 that in the county court when a case is remitted the county court judge will give the same effective justice as would have been given in the High Court,

(1) [1936] 2 K. B. 215, 223.
(2) [1932] W. N. 115.
(3) [1922] 2 K. B. 158, 162.
(4) [1916] 2 K. B. 335.

C. A.
1938

PHILLIPS
v.
A. LLOYD
& SONS,
LD.

Scott L.J.

and particularly that there is no reason why he should give less damages to a successful plaintiff than would have been given in the High Court.

The other observation is that in these accident cases the matters upon which the discretion of the learned judge should be based are those referred to in the recent case of *Stevens* v. *Walker* (1) in the judgment of Lord Wright M.R.—namely, the gravity of the claim and the strength of the defence. Prima facie where it is a case of personal injuries and the injuries are such as in all probability to cause permanent earning incapacity in greater or lesser degree throughout life, that case ought normally to remain in the High Court. The Poor Persons Rules make it very much less important now than formerly to consider, in a case of that kind, whether or not security should be given. Therefore the earlier cases dealing with security do not throw very much light on the present position. Beyond that I have nothing to add to the judgments which have been delivered, and with which I agree.

Appeal dismissed.

For the appellants: *Hiscocks & Co.*
For the respondents: *William Easton & Sons.*

J. R.

---

(1) [1936] 2 K. B. 215.

C. A.
1938
Feb. 17, 24.

EASTERLING *v.* PEEK, FREAN AND COMPANY, LIMITED.

Workmen's Compensation—Industrial Disease—Failure to claim compensation within six months of the disablement—Certificate of certifying surgeon dated after expiration of six months—Reasonable cause—Certificate necessary before any claim possible—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 14, *sub-s.* 1; *s.* 43, *sub-s.* 1 (*a*).

E., a married woman, at one time an employee of the respondents, was certified on June 4, 1937, to be suffering from a disease scheduled under s. 43 of the Workmen's Compensation Act, 1925, and known as dermatitis, produced by dust or liquids. The certifying surgeon certified that disablement commenced on September 11, 1936, and that she was thereby disabled from earning full wages at the work at which she had been employed. The certificate was thus dated more than six months after the date on which disablement was certified to have commenced. E. had been in the employ of the respondents for many years before September 11, 1936, when she left their service, and had been under treatment for irritation of the skin on her fingers for some time prior to that date. A claim for compensation must, under s. 14, sub-s. 1, of the Workmen's Compensation Act, 1925, be made within six months from the occurrence of the accident.

E. having claimed compensation in the county court, it was held by the county court judge that she had not discharged the onus incumbent upon her to show that there was a "reasonable cause" for her not making a claim within six months from September 11, 1936, and that she was not entitled to compensation. E. appealed:—

Held (reversing the judgment of the county court judge), that it could not be said that a workman had not shown "reasonable cause" when he did not make a claim within the six months in a case where, during that period, he had not been certified to be suffering from the notional accident which alone could give him the right to make a claim. No such thing as "reasonable cause" could under s. 14 be considered in respect of an applicant failing to present himself to the certifying surgeon, since the Act did not anywhere lay down any such duty. For that reason "reasonable cause" must be held to have been shown when during the six months' period in which he could have claimed he could not produce the certificate, which constituted the accident, and which alone could support his claim.

Held also, that the county court judge was wrong in his conclusion that on the evidence produced the appellant had not shown "reasonable cause," and that the appellant was entitled to compensation.

Appeal allowed.

The remarks of Lord Atkin in *Kitchen* v. *C. Koch & Co.* [1931] A. C. 753, at pp. 764, 765 considered and applied.

Per Scott L.J. Sect. 14 (1.) must be construed as giving the workman an absolute right to substantially the full period of his six months for reflection; the views expressed by Lord Hanworth M.R. in *Holt* v. *Andrew Hobson & Sons* (1930) 23 B. W. C. C. 242 on the duty of a disabled workman to go as speedily as possible to the certifying surgeon, in order to discharge the onus of showing "reasonable cause," dissented from.

APPEAL from a judgment of His Honour Judge Bensley Wells in the Southwark County Court.

The appellant, a Mrs. E. F. Easterling, had been in the employ of the respondents as a biscuit packer for many years prior to 1936. From the evidence adduced before the county court judge it appeared that sometime in the year 1932 she noticed that there was something wrong with her hands, a rash appearing and a certain amount of irritation of the skin between the fingers. She applied to the respondents' doctor, who gave her some ointment to rub in; and at various times she saw him, when he prescribed a different kind of ointment. According to her evidence the treatment, which she continued for some considerable time, did not seem to do her any good; and as her hands were not improving she was given at her own request in 1935 different employment with the respondents—namely, as a checker. The appellant left the employ of the respondents on September 11, 1936, in order to get married and did not return to work at their premises again. Very shortly after her marriage and on her return from her honeymoon the rash and irritation on her hands seemed to be just as bad as before, notwithstanding that she had continued to apply the ointment given her by the doctor. She therefore signed on at the labour exchange in October, but removed her name from the register in November and abandoned any idea of applying for employment while the rash and irritation of the skin on her hands continued. On April 6, 1937, she consulted a Dr. Taylor, another doctor, who according to her evidence informed her for the first time that she had got dermatitis and gave her some fresh ointment to rub on

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& CO.

her hands. She visited him for treatment at intervals until about the end of May or the beginning of June, 1937, when he sent her to Guy's Hospital. On June 4, 1937, she was given a certificate by a certifying surgeon appointed under the Factory and Workshop Act, 1901, that she was suffering from dermatitis produced by dust or liquids and was thereby disabled from earning full wages at the work at which she had been employed and that the disablement commenced on September 11, 1936. The certificate was thus dated more than six months after the date on which disablement was certified.

The disease from which the appellant was certified to be suffering was a disease coming under the Workmen's Compensation Act, 1925, s. 43, and Third Schedule, as extended by Sch. 12 (*a*) to the Workmen's Compensation (Industrial Diseases) Consolidation Order dated January 1, 1929. By s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, where a certifying surgeon certifies that the workman is suffering from such a disease as dermatitis and is thereby disabled from earning full wages at the work at which he was employed, he shall be entitled to compensation as if the disease was a personal injury by accident arising out of or in the course of that employment, subject to the modification that such disablement should be treated as the happening of the accident. By s. 14, sub-s. 1, of the Workmen's Compensation Act, 1925, the claim should properly have been made within six months from the occurrence of the accident, subject, however, to the proviso to the sub-section. (1)

(1) Workmen's Compensation Act, 1925, s. 14, sub-s. 1: "Proceedings for the recovery under "this Act of compensation for an "injury shall not be maintainable "unless notice of the accident has "been given as soon as practicable "after the happening thereof ". . . ., and unless the claim "for compensation with respect to "such accident has been made "within six months from the "occurrence of the accident "causing the injury, or, ...

"Provided that (*a*) . . . . "(*b*) the failure to make a claim "within the period above specified "shall not be a bar to the maintenance of such proceedings if it "is found that the failure was "occasioned by mistake, absence "from the United Kingdom, or "other reasonable cause."

The matter thereupon came before Judge Bensley Wells in the Southwark County Court on a claim by the appellant for compensation, when the learned county court judge held on October 7, 1937, that she had not discharged the onus incumbent upon her to show that there was reasonable ground for her not making a claim within six months from September 11, 1936, and that therefore she was not entitled to compensation. The appellant therefore appealed.

Hon. Sir Stafford Cripps K.C. and *G. Granville Slack* for the appellant. Though the claim should properly have been made, at the latest, on March 11, 1937—the date of disablement having been certified as commencing on September 11, 1936—yet at that date in March she had not been certified as suffering from a certifiable disease. It is submitted, therefore, that this fact constitutes a "reasonable cause" for not making a claim and comes within s. 14, sub-s. 1, proviso (*b*), of the Workmen's Compensation Act, 1925. (1) No claim could be made until the certifying surgeon had given his certificate; there was no right to make one. The first consideration which the Court has to bear in mind is the period fixed; as to this compare *Lingley* v. *Thomas Firth & Sons, Ld.* (2), where the facts are very different to these. See, however, *Moore* v. *Naval Colliery Co., Ld.* (3), as to what may be "reasonable cause" and where the facts somewhat resemble those now before the Court.

An important case on this point is one in the House of Lords, *Kitchen* v. *C. Koch & Co.* (4), reversing a decision of the Court of Appeal (5); see Lord Atkin's remarks (6) and those of Lord Thankerton (4). The Act of 1925 does not impose a duty on the workman to go to a certifying surgeon, and as Lord Atkin puts it in *Kitchen's* case (4) "make an accident." Another important case for consideration

---

(1) See note (1), ante p. 302.

(2) (1920) 13 B. W. C. C. 367.

(3) [1912] 1 K. B. 28; 5 B. W. C. C. 87, 93, 95.

(4) [1931] A. C. 753, 766, 768; 24 B. W. C. C. 294.

(5) (1930) 23 B. W. C. C. 349.

(6) [1931] A. C. 766.

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& Co.

is *Gwilym* v. *Aberbeeg Collieries, Ld.* (1), where "reasonable cause" in a silicosis case was considered. The reason here that the claim was not made earlier was on account of it not being possible for the appellant to make it; that is a "reasonable cause" for failure to make one and the appellant should be entitled therefore to the compensation provided for by the section.

Further, the learned county court judge was wrong in law in deciding that on the facts before him no "reasonable cause" was shown by the appellant.

James MacMillan for the respondents. The impossibility for not making a claim is, it is submitted, not a "reasonable cause" for not making it: see *Holt* v. *Andrew Hobson & Sons.* (2) All the cases naturally depend on each particular circumstance, and no general principle has really ever been laid down.

[The argument principally consisted of a discussion and criticism of the cases cited on behalf of the appellant.]

Hon. Sir Stafford Cripps K.C. in reply.

Cur. adv. vult.

1938. Feb. 24. SLESSER L.J. This case raises a difficult question of construction under the Workmen's Compensation Act, 1925, which has been before the Courts on several occasions, but which I think has never definitely been decided.

The problem arises thus: By s. 14, sub-s. 1, of the 1925 Act, it is provided that proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless . . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident occasioning the injury . . . . ; Provided that "(*b*) the failure to make a claim within the "period above specified shall not be a bar to the maintenance "of such proceedings if it is found that the failure was "occasioned by mistake, absence from the United Kingdom, "or other reasonable cause." By s. 43, sub-s. 1 (i.), of the

(1) (1936) 29 B. W. C. C. 273, 279. (2) (1930) 23 B. W. C. C. 242, 253.

same Act, where the certifying surgeon duly appointed certifies that the workman is suffering from certain diseases and is thereby disabled from earning full wages at the work at which he was employed and the disease is due to the nature of certain employments, he shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment, subject to the following modifications: (*a*) "the disablement . . . . shall "be treated as the happening of the accident"—I omit words here not material.

In this case the applicant, Ethel Easterling, was certified on June 4, 1937, to be suffering from a scheduled disease described as dermatitis produced by dust or liquids, and the surgeon further certified that the disablement commenced on September 11, 1936. Now in so far as the disablement is to be treated under s. 43, sub-s. 1 (*a*), as the happening of the accident, applying s. 14, the claim would have to be made within six months from the occurrence of that accident, which date would be, at the latest, March 11, 1937. At that time the applicant had not been certified to be suffering from a scheduled disease, and was not therefore in a position to know proleptically that she would thereafter, on June 4, be able to be so retrospectively certified. In these circumstances it is contended by Sir Stafford Cripps that she must of necessity have had a "reasonable cause" for not making a claim within six months. Alternatively he contends, if the facts of this particular case are to be considered, that the learned country court judge was wrong in law in coming to the conclusion that there was here no "reasonable cause" shown by her. On the first contention, if it be correct in circumstances such as these, the workman is relieved from any further obligation to show "reasonable cause" when once he has shown by the date of the certificate that the disablement commenced more than six months before he received it. If the retrospective period found were less than six months, it would appear that the Court might inquire into the question whether during a part of the unexpired period of six months, in which there was a possibility to make a claim, the workman had or had not unreasonably abstained from making it. This I think is the effect of the decision of the majority of this Court in *Holt* v. *Andrew Hobson & Sons* (1), where ten days from the six months were open to the workman in which to make his claim. That case is of no assistance in solving the present problem.

In my view apart from authority I find it impossible to see how a man can be said to be without "reasonable cause" when he does not make a claim within the period of six months during the whole of which he had not in law been certified to have suffered that notional accident which alone could give him the right to make the claim. The only possible way in which it could be said that such a man had foregone his rights would depend upon the contention that in a particular case, knowing his condition by medical advice or otherwise, he negligently had abstained from applying to the certifying surgeon to give him a certificate. But the "reasonable cause" contemplated under s. 14 is one which exempts him from making a claim. There is no "reasonable cause" to be considered in respect of failing to present himself to the certifying surgeon, for the very good reason that no duty so to present himself is to be found in the statute. As Lord Atkin has tersely put it in the case of *Kitchen* v. *C. Koch & Co.* (2): "Reasonable cause for failure "to make a claim for an accident seems to me a different "thing from reasonable cause for failure to make an accident." There is no obligation upon the workman under s. 43 or otherwise to obtain a certificate and so to create a notional accident within any particular time.

For this reason as a matter of principle unfettered by authority I should have held that as a matter of law it must be "reasonable cause" that, during the six months' period in which a man may ordinarily claim, he could not produce the certificate which constitutes the accident which alone could support any claim at all. If this be right, the facts of any particular case become immaterial once it is established

(1) 23 B. W. C. C. 242.
(2) [1931] A. C. 753, 766; 24 B. W. C. C. 294, 306.

that the certificate produces an accident retrospectively more than six months before the date of granting it; the "reasonable cause" is sufficiently established as a matter of law and the workman has discharged whatever limitation may otherwise be imposed upon him as to time under s. 14.

I turn to the decided cases to see whether they bind me to hold anything to the contrary. So far as this Court is concerned, in the recent case of *Gwilym* v. *Aberbeeg Collieries, Ld.* (1), the view was expressed by Scott L.J. at p. 280 and by myself at p. 279 that the matter was still open for consideration. In my view this present appeal on the finding of the learned judge makes necessary a decision on this point, because the learned county court judge, on the facts which I have stated as to the dates of the certificate and its contents, has held that the onus was on the applicant to satisfy him that there was reasonable ground for not making the claim within six months from September 11, 1936, and that the applicant has failed to discharge that onus.

The only case in which this matter has been considered directly in the House of Lords is the case of *Kitchen* v. *C. Koch & Co.* (2) There a workman obtained a defective certificate on July 4, 1929, which, as Lord Warrington points out, was not in fact a certificate under the Act at all. On November 19, 1929, the workman was examined a second time, and a second certificate was given which was defective because of its unintelligible date of disablement. Finally on January 18, 1930, a valid certificate was given giving the date of disablement as May 22, 1929—the word "May" had been left out of the second certificate—which gave a date for disablement admittedly more than six months from the date of the certificate. The county court judge held that the workman was out of time and in the Court of Appeal (3) he was upheld. In that Court I do not think that the more general proposition, that in any event having regard to the dates there must in law have been a reasonable cause, was

---

(1) 29 B. W. C. C. 273, 279, 280.
(2) [1931] A. C. 753, 761; 24 B. W. C. C. 294, 302.
(3) (1930) 23 B. W. C. C. 349, 357, 361, 363.

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& Co.

Slesser L.J.

advanced by Mr. Cave, who appeared for the appellant workman. Lord Hanworth M.R. (1) says that the workman had failed to make good by proving "reasonable cause," after dealing with the particular facts of the case. And I point out (2): "But Mr. Cave does not suggest, I "think, and certainly I am not prepared to hold, that that "case [*Moore* v. *Naval Colliery Co., Ld.* (3), which he had "cited] . . . . is laying down any general principle of law "beyond this, that there may be cases where it would be "proper to hold that there was reasonable cause when the "only ground why the workman had not claimed was because "the certificate had a retrospective effect which carried him "back more than six months before the date of the claim." So also Romer L.J. says (4): "The learned county court "judge has found as a fact that there is no satisfactory "explanation given as to why the workman delayed sub"mitting himself for further examination by the certifying "surgeon and getting his certificate until November 19." In the House of Lords, as the argument is reported in the Law Reports (5), Mr. Cave again abstained from basing his argument on any more general question of law. The House held, as I read their speeches, unanimously that in the circumstances of that case the proper view was that the workman had established a "reasonable cause," and therefore reversed the decision of the Court of Appeal and the county court judge; but the more general principle of law, whether on the dates the workman was relieved from establishing anything more than the impossibility of making a claim, was certainly discussed by several of their Lordships with differing opinions. The views which I have here tentatively expressed find direct support in the speech of Lord Atkin (6), where he points out that: "By the provisions of the Act as to industrial diseases it is "plain that the workman has no claim under the Act unless and "until he has received a certificate from the certifying surgeon.

(1) (1930) 23 B. W. C. C. 349, 357, 361, 363.
(2) Ibid. 361.
(3) [1912] 1 K. B. 28; 5 B. W. C. C. 87.
(4) 23 B. W. C. C. 363.
(5) [1931] A. C. 753, 755.
(6) [1931] A. C. 753, 764.

"Until then he has not met with an accident, which under "the Act is the disability certified by the surgeon ; and he "does not know the date of the accident, for that is the date "of the disability, which can be fixed only by the certifying "surgeon. He cannot therefore give notice of the accident or "make a claim until there is a certificate. By the provisions "of s. 14 the claim must be made within six months from "the occurrence of the accident. When, therefore, as in the "present case, the date of disablement is fixed at a date "more than six months earlier than the certificate, it is "impossible to comply with the Act. . . . . Two possible "views emerge. Either the obligation to make a claim within "six months does not exist where it is impossible in fact "and in law to make any claim : or the failure to do what is "impossible is excused, because impossibility is reasonable "cause for not doing the impossible. I am bound to say that "I prefer the first alternative." He points out that this view was expressed by Cozens-Hardy M.R., possibly only as dictum, in *Moore's* case (1), and continues : " But though I hold this "view, I am satisfied to deal with the present case on the "footing that the latter alternative applies ; and that the "question is whether there is reasonable cause for failure to "make the claim within six months. On this assumption "the workman surely discharges the onus upon him of showing "reasonable cause by proving that it was in fact and in law "impossible to make the claim at any time before the "certificate." He then points out that in his view the question whether the workman acted unreasonably in not procuring the certificate of the surgeon so as to procure for himself a dated accident for which he could claim is beside the point. He can find no such obligation and he dissents from the view of Farwell L.J. in *Moore's* case (2), where he had said: "The point we have to consider is not so much whether "the claim was unreasonably delayed, as whether "the visit to the certifying surgeon was unreasonably "delayed." Lord Atkin comments (3) : " The first question is

(1) [1912] 1 K. B. 28, 31.
(2) Ibid. 35.
(3) [1931] A. C. 766.

C. A.
1938

EASTERLING v. PEEK, FREAN & Co.

Slesser L.J.

"within the scope of the sub-section; the second I cannot "find in the sub-section." It is right to say that no other of their Lordships express themselves in language which seems to support the views of Lord Atkin. Indeed, Lord Thankerton appears to say the opposite in these words (1) : "I agree that "primarily it is for the workman to prove the 'reasonable "'cause,' and that unreasonable delay in presenting himself "for examination by the certifying surgeon is an element to "be taken into consideration by the Court." Lord Blanesburgh dissents from the view of Cozens-Hardy M.R. in *Moore's* case (2)—namely, "I am clearly of opinion that it is not possible to hold . . . . where . . . . the certificate may "go back a long time, certainly twelve months, that a workman "is disabled from presenting after the expiration of six months "an application in which the date of the accident has to be "stated, when the certificate, which alone fixes the date of "the accident, may fix it more than six months back." But this is dealing I think rather with the first of Lord Atkin's alternatives that in such circumstances the obligation to make a claim within six months does not exist, rather than his second alternative that in such a case there is of necessity reasonable cause. Lord Warrington quotes Cozens-Hardy M.R. in *Moore's* case (2) without comment, neither in terms agreeing with nor dissenting from the views of Lord Atkin.

In my judgment in all these circumstances, seeing that the House of Lords there held that there was on the facts "reasonable cause," I do not think that what was there laid down amounts to any denial of the view that in any circumstances the workman may show reasonable cause for abstaining from a claim in cases where in fact he could not during the six months following the date of the disablement (as found by the certifying surgeon) make an effectual claim. Of the alternatives suggested by Lord Atkin, for myself I favour the latter view. While it is true that in certain cases compliance with the provisions of statutes which prescribe how something is to be done will be excused if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances, yet here I think that the provision in the statute itself of the excuse of "reasonable cause" is sufficient to justify the view that s. 14, with the benefit of this exception to its obligations, can be wedded to s. 43 without producing an impossibility.

---

(1) [1931] A. C. 768.

(2) [1912] 1 K. B. 28, 35.

It was upon this view that Lord Atkin ultimately proceeded and it commends itself to my mind. In so far as Lord Hanworth M.R. expressed a view in *Holt* v. *Andrew Hobson & Sons* (1) that the workman should have seen a certifying surgeon earlier, as I pointed out in *Gwilym* v. *Aberbeeg Collieries, Ld.* (2), I respectfully disagree. My own view in *Holt's* case (1), and I think Romer L.J.'s, was based upon the failure of the workman to make his claim between the giving of the certificate and the time when he actually made the claim which, in our opinion, left open the question whether, on the facts, there was or was not "reasonable cause." In *Holt's* case (1) a claim was possible, though the time for making it was short, and if there be anything said in the Court of Appeal in *Kitchen* v. *C. Koch & Co.* (3) to the contrary, I think that the reversal of that decision in the House of Lords (4) now leaves the matter res integra.

Finally I would say that, if my view of the law be erroneous on this head and the question can be considered whether in the circumstances there was any obligation upon the applicant to present herself earlier than she did to the certifying surgeon, I think that the learned county court judge was wrong in his conclusion that she had not shown "reasonable cause." The evidence goes to show that as early as 1932, the applicant went to the respondents' own doctor about an irritation on her left hand and he did not tell her what it was. She went again in two or three days when a second ointment was applied and she went to the doctors at intervals until she left, sometimes seeing a Dr. Ross and sometimes other doctors of the respondents who were there, one after another. Later when she was doing at her own request a different type of work, a labelling job, she found out that some of the girls had a rash from doing it, but her hands improved considerably. Up to that time she only had it on the left hand, except very slightly once on the right. During the last period of her employment with the respondents she went to the doctor once in every three months until she left on September 11. Her housework after she had married caused the rash and irritation to break out again, and on April 6, 1937, she went to her own doctor, Dr. Taylor, who for the first time told her that she had dermatitis. From April 6, 1937, until the arbitration she attended him every week. He sent her to Guy's Hospital at the end of May or beginning of June, and on June 7 she obtained her certificate from the surgeon. On these facts it would appear that the doctors for the respondents at all times left her in ignorance as to the nature of her disease, and after she left as a consequence of her housework she consulted her own doctor, who for the first time on April 6, 1937, told her that she was suffering from dermatitis. This was of course more than six months after September 11, 1936, the date fixed by the certifying surgeon for the beginning of the disablement. In my view on these facts the proper conclusion in law is that in the absence of all information from the respondents' doctors (who constantly examined her) and the absence of any previous symptoms to lead her to believe that after she left her work she suffered from any certifiable disease, other than that for which she had consulted them, no sooner was she apprised of her real condition on April 6, 1937, than, immediately after treatment at Guy's Hospital, she went to the certifying surgeon. I see no reason to suppose that she unduly delayed her visits to him, assuming that she was under any duty to go to him earlier than she did—an assumption which (for the reasons I have pointed out) I follow Lord Atkin in declining to make.

---

(1) 23 B. W. C. C. 242, 253.
(2) 29 B. W. C. C. 273.
(3) (1930) 23 B. W. C. C. 349.
(4) [1931] A. C. 753; 24 B. W. C. C. 294.

This appeal therefore succeeds and will be allowed with costs.

SCOTT L.J. I agree with the conclusion of Slesser L.J. that this appeal must be allowed. He has stated the facts and I need not repeat them. The important question of law arises upon grounds Nos. 1 and 2 in the notice of appeal. They were intended to raise the two possible views of the legal position which arises in a case of industrial disease under s. 43 of the Workmen's Compensation Act, 1925, where the date of disablement certified by the certifying surgeon is more than six months anterior to the certificate—namely, (1.) that in such a case the six months' limit of s. 14 has no application at all, and alternatively (2.) that, if in theory it should be regarded as applicable, there must as a conclusion of law be a finding of "reasonable cause." The legal choice between these two is academic, because on either view the bar to proceedings is excluded.

In the present case, if either is right, the appeal must be allowed. Conversely each ground may be a true ratio decidendi upon which to rest our judgment. The statement in the notice of appeal of the two grounds of appeal is no doubt framed upon the well known passage in the opinion of Lord Atkin in *Kitchen* v. *C. Koch & Co., Ld.* (1), to which my Lord has referred. In that case the basic facts were similar to those in the present case. I humbly subscribe to the whole of what Lord Atkin there said, and regard his exposition of principle as so important that it is best to quote the passage in full: "By the provisions of the Act as to "industrial diseases it is plain that the workman has no "claim under the Act unless and until he has received a "certificate from the certifying surgeon. Until then he has "not met with an accident, which under the Act is the "disability certified by the surgeon; and he does not know "the date of the accident, for that is the date of the disability, "which can be fixed only by the certifying surgeon. He "cannot therefore give notice of the accident or make a "claim until there is a certificate." After referring to s. 14 he continued: "Two possible views emerge. Either the "obligation to make a claim within six months does not "exist where it is impossible in fact and in law to make any "claim: or the failure to do what is impossible is excused,

---

(1) [1931] A. C. 753, 764, 765.

C. A.
1938

Easterling
v.
Peek,
Frean
& Co.

Scott L.J.

"because impossibility is reasonable cause for not doing the "impossible. I am bound to say that I prefer the first "alternative—'Lex non cogit ad impossibilia'" and then, referring to the words requiring that the claim shall be made within six months of the accident, he continued: "When "the words in the widest sense are capable of applying to "cases where the obligation can be performed and to cases "where the obligation cannot be performed, it seems to me "a sound rule of construction to infer that the Legislature "only intended to impose an obligation that could be performed. This is the view expressed, probably only as a "dictum, by Cozens-Hardy M.R. in *Moore* v. *Naval Colliery "Co., Ld.*" (1) The House definitely did not decide the case on the first ground and did not in terms purport to adopt Lord Atkin's second view; it allowed the appeal because it held that on the undisputed facts only one legal conclusion was possible—namely, that, "reasonable cause" had been proved. If this Court is free to adopt either or both of Lord Atkin's views and is not precluded by authority, I think we ought to express our respectful acceptance of both, and apply both to the simple facts of the present case, which are identical with those present in *Kitchen's* case. (2) Lord Atkin's first view compels my assent just as irresistibly as the second.

When first passed by Parliament, the provision which is now contained in s. 14, sub-s. 1 (and was then s. 2 of the Workmen's Compensation Act, 1897), did not contain the present proviso (*b*) to s. 14, sub-s. 1. (3) It was addressed only to real accidents, as industrial diseases had not then been brought into workmen's compensation. They were brought in by s. 8 of the 1906 Act, sub-s. 1 of which was in the same terms as the present s. 43, sub-s. 1. At the same time the present proviso (*b*) to sub-s. 1 of s. 14 (3) was added in s. 2 of the 1906 Act. I do not doubt therefore that s. 43 compels the Court to treat s. 14 as applicable to the notional accidents created by the terms of s. 43 so far as it is possible to do so, interpreting s. 14 in the light of s. 43 when so applying it.

(1) [1912] 1 K. B. 28, 31.
(2) [1931] A. C. 753, 764, 765.
(3) See note (1), ante p. 302.

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& Co.

Scott L.J.

But it is just there that the difficulty of applying the six months' limit to the notional accident arises. Where the whole six months have elapsed before the certificate is given, the plain logic of the situation seems to me to lead necessarily to Lord Atkin's first view. The six months' bar cannot apply. But the logic of that interpretation is supported by a consideration of what appears to me to be the policy of s. 14. It is true that the limitation, as has often been pointed out, is for the protection of the employer from stale claims and from the inherent difficulty of keeping evidence available to test stale claims or of re-collecting it. But why did Parliament allow so long a limit as six months in contrast to the promptitude required for notice of the accident? Surely because it was thought fair and reasonable to give the workman that length of time from the date of the accident to think over his prospect of enforcing a claim which his employer has in effect told him he will fight by refusing, after receipt of the notice of the accident, to agree to pay compensation. These reasons lead me to the conclusion that s. 14 (1) must be construed as giving the workman an absolute right to substantially the full period of his six months for reflection. If there were in either s. 14 or s. 43 any provision to mitigate the prejudice to the workman caused by a shortening of his six months from the date of the notional accident through the antedating of it in the certificate, the position would be different. But there is none. The result is that I cannot regard it as consistent with the policy of ss. 1 and 43 of the Act, which confer the basic right to compensation, to construe s. 14 (1) as depriving him of it by the six months' bar unless he has the whole six months to decide what course of action he will pursue in view of his employer's failure, upon notice of the accident, to accept liability. It is no answer to the argument, if sound, to say that the deprivation of right by the time bar will be avoided if there is "reasonable cause" for delay. The enjoyment of the six months' period must be an actual possibility before the proviso giving relief from its bar can begin to be relevant.

(1) See note (1), ante p. 302.

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& CO.

Scott L.J.

The conclusion that the bar does not apply at all, unless the whole six months are available, seems to me more consistent with the spirit of ss. 1 and 43, than the interpretation of s. 14 as applying its absolute bar even when the workman has only a mere fraction of his six months' period still left at the moment when he first learns of the date of his notional accident. The result is in my opinion that the six months' bar has no application in cases of industrial disease or silicosis (for s. 47 is analogous to s. 43) where the disablement is antedated, at any rate by more than a day or so, where the curtailment might possibly be negligible under the rule of "de minimis non curat lex." I recognize that partial deprivation of the full six months' period does not arise directly in the present case and that consequently what I have said is to that extent obiter; but if the policy of the Act be what I think it is, it affords an almost conclusive support—if support be needed, which I do not think it is—to the purely logical reasoning of Lord Atkin's first view. If on grounds of policy some via media would afford a fairer adjustment between the employer and the workman, it is open to Parliament to enact some suitable compromise; but as the Act is now expressed, the above conclusion seems to me to accord with its true meaning.

Now let me consider the question of authority. I do not think there is any definite decision which precludes this Court from adopting Lord Atkin's first view, that where the certificate antedates the notional accident by more than six months the bar has no application. As regards my supporting argument—that the Act intends the workman to have the full benefit of his six months' privilege—there is I believe only one decision in the way, but that is definitely against it. I refer to *Holt* v. *Andrew Hobson & Sons*. (1) I will return to it presently. Decisions in cases like *Moore* v. *Naval Colliery Co., Ld.* (2), where the certificate antedated the accident by more than six months and the Court held that there was "reasonable cause," obviously do not touch Lord Atkin's first view. Indeed decisions affirming the existence of

---

(1) 23 B. W. C. C. 242, 245.

(2) [1912] 1 K. B. 28; 5 B. W. C. C. 87.

"reasonable cause" do not touch my first proposition any more than Lord Atkin's. Decisions in cases concerned with real accidents, such as *Lingley* v. *Thomas Firth & Sons, Ld.* (1) (which was cited to us), are beside the point. But the case in this Court of *Holt* v. *Andrew Hobson & Sons* (2) is inconsistent with my view. That case was not one of industrial disease under s. 43, but a silicosis case under s. 47. It is, however, in point because the relevant provisions contained in s. 47 and para. 11 of the silicosis scheme then in force (set out on p. 245 of the report) are identical in effect with s. 43. There the notional date of the accident was fixed by the surgeon very nearly six months before the certificate, but there were ten days left for the workman to claim before the six months expired. The workman made his claim two days after the last of these ten days. The county court judge took into account delay in going to the certifying surgeon at a much earlier date and, adding that factor to the delay during the ten days at the end, held that there was no "reasonable cause" and rejected the claim. This Court dismissed the workman's appeal. Lord Hanworth took the same view of the law as the county court judge and thought the delay in going to the surgeon for a certificate was an element to consider on "reasonable cause," although he relied on a different period in the story to that which the county court judge thought material. Slesser L.J. and Romer L.J. in very short judgments concurred in his conclusion, but solely on the ground that the workman still had ten days within which to claim. They were careful to avoid endorsing Lord Hanworth's view that delay in going to the certifying surgeon was a relevant factor in deciding whether reasonable cause existed for the claim not having been made within the six months. And in a later silicosis case, *Gwilym* v. *Aberbeeg Collieries, Ld.* (3), Slesser L.J. during the argument pointed out that "there is no obligation in the Act or Scheme." I realize that the decision would have been impossible if my view had been the test and that therefore that decision is prima facie an obstacle to my view, but I do not think it is an authority for the proposition that the Court is entitled to pay any attention to the question of delay by the workman in going to the certifying surgeon after acquiring knowledge that he has a certifiable disease ; Lord Hanworth's view was only an obiter dictum and I respectfully disagree with it. There being no express provision in s. 43 either as a directory requirement or as a condition precedent to the right to a certificate to indicate that it will make any difference in the legal sense to the workman how soon he goes or how slow he is in going to the certifying surgeon, it seems to me impossible to infer a duty of diligence in that respect. The Act seems to have assumed that the man's sense of self-interest would suffice.

---

(1) 13 B. W. C. C. 367.
(2) 23 B. W. C. C. 242, 245.
(3) 29 B. W. C. C. 273, 275.

The decision in *Holt's* case (1) being plainly contrary to part of the reasoning by which I support my major view, it is essential to consider to what extent it is binding on this Court to-day. I will begin with Lord Hanworth's view of the supposed duty of the workman to avoid delay in going to the certifying surgeon. In *Kitchen's* case (2) the Court of Appeal took the same view as Lord Hanworth did in *Holt's* case (1) with regard to the supposed duty of a workman disabled by an industrial disease within the Act to be diligent in going to the certifying surgeon, and Lord Hanworth, Slesser L.J. and Romer L.J. in terms affirmed that duty, the last-named member of the Court citing a similar expression of opinion by Farwell L.J. in *Moore* v. *Naval Colliery Co., Ld.* (3), and treated a failure in that duty as germane to the question of reasonable cause. In *Kitchen's* case in the House of Lords (4) one noble Lord, Lord Thankerton, assented to this idea of duty on the workman in these words: "I agree that primarily "it is for the workman to prove the 'reasonable cause,' and "that unreasonable delay in presenting himself for examina-"tion by the certifying surgeon is an element to be taken into "consideration by the Court." But he was the only member

(1) 23 B. W. C. C. 242, 253.
(2) 23 B. W. C. C. 349.
(3) [1912] 1 K. B. 28 ; 5 B. W. C. C. 87.
(4) [1931] A. C. 753, 768.

C. A.
1938
EASTERLING
v.
PEEK,
FREAN
& Co.
Scott L.J.

of the House who did express that view. Lord Blanesburgh, who delivered the leading opinion (concurred in by Lord Dunedin, who had not heard the whole argument), made no mention of it. Lord Warrington expressed himself in terms which I think indicate his disagreement with it, or if the passage in question should be otherwise construed, was silent about it. What he said was this (1): "Much reliance was placed "on a finding of the arbitrator that during the whole period from "July 24, 1929, to January 18, 1930, the appellant and Whit-"worth, the trade union secretary, knew that the appellant had "epitheliomatous cancer. But with all respect, this is not "the point; the question is when did they, or either of them, "first know the date of the occurrence (as it is called in s. 14) "of the accident? This they knew for the first time on "January 18, 1930, when the surgeon gave his certificate of "that date certifying that disablement commenced on May 22, "1929." Lord Atkin, after considering the question with which I dealt at the beginning of my judgment, proceeded on the alternative basis and assumed that there was still an issue to decide about "reasonable cause," the relevant dates being certificate January 18, 1930; certified date of notional accident, May 22, 1929; written notice of claim January 30, 1930. He said (2): "On this assumption the workman "surely discharges the onus upon him of showing reasonable "cause by proving that it was in fact and in law impossible "to make the claim at any time before the certificate. "I should again have thought this to be a complete and final "discharge of the onus. But it is suggested that there is a "further inquiry to be made—namely, whether the workman "during the period of six months from the certified date of "the disability has acted unreasonably in not procuring the "certificate of the surgeon so as to procure for himself a dated "accident for which he can claim. My Lords, I am bound to "say for myself that I cannot find such an obligation in the "bond. Reasonable cause for failure to make a claim for an "accident seems to me a different thing from reasonable "cause for failure to make an accident. I therefore think

---

(1) [1931] A. C. 753, 763.

(2) Ibid. 765.

C. A.
1938

EASTERLING
v.
PEEK,
FREAN
& Co.

Scott L.J.

"that Farwell L.J. construed the section too rigorously when "in *Moore* v. *Naval Colliery Co., Ld.* (1) he said the question "'is not so much whether the claim was unreasonably delayed, "'as whether the visit to the certifying surgeon was unreasonably delayed.' The first question is within the scope of the "sub-section: the second I cannot find in the sub-section. "No doubt the result would be that the workman suffering "from an industrial disease might delay getting the certificate "and so delay for years the occasion for a claim. But in "view of the fact that he would in the interval not be getting "compensation, and would run the risk of not being able to "prove that the disablement commenced within twelve "months of his last employment, the practical disadvantage "to the employer does not seem serious." It is true that the noble Lord went on to say that it was not necessary to decide the point as the House was unanimous that—even assuming that the question of unreasonable delay in getting the certificate arose—there was "reasonable cause." But what I have said of the views expressed is I think sufficient to release us to-day from the trammel of *Holt's* case (2) as a binding decision on that point, and I venture therefore humbly to say that in my opinion on that point the decision was wrong.

Now the learned county court judge held in the present case that "reasonable cause" was disproved because the applicant ought in the light of what she knew about the state of her hands to have made a claim earlier. On this point therefore he was wrong. But the fact that the House of Lords disapproved of the view expressed by Lord Hanworth in *Holt's* case (2)—that delay by a workman in getting his certificate is an element to be taken into account in considering delay after getting the certificate—does not of itself negative the authority of *Holt's* case (2) as a decision upon the other point—namely, that the six months' bar may still apply even although most of the period is already past at the date of the certificate.

(1) [1912] 1 K. B. 28, 35; 5 B. W. C. C. 87, 95.
(2) 23 B. W. C. C. 242.

All I can say therefore is that I express the view that the workman is entitled to his whole period of six months with hesitation and subject to the doubt that I ought perhaps to treat myself as precluded from relying on it as an additional reason why, where he has none of it left, the bar must as a matter of law be treated as wholly out of the statutory picture. Whether this reason is or is not open to us in this Court does not really matter, unless there be a doubt on Lord Atkin's first proposition, which I do not think there is. That Lord Atkin's alternative view must apply if his first is wrong I have no doubt. Impossibility of doing a thing must constitute a "reasonable cause" for not doing it. But in any view of the case I have no hesitation in saying that the undisputed facts necessarily establish the inference of "reasonable cause."

Solicitors: *W. H. Thompson*; *Gardiner & Co.*

A. R. LL.-T.

1938
April 27.

DANIEL *v.* RICKETT, COCKERELL AND COMPANY, LIMITED, AND RAYMOND.

Negligence—Personal injuries—Open cellar flap in pavement—Damages against coal merchant and householder—Third-party proceedings for indemnity or contribution—" Just and equitable "—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 2.

By sub-s. 2 of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is provided that in any proceedings for contribution between joint tortfeasors under that section the amount of the contribution recoverable from any person shall be " such as may be found by the court to be just and equitable " having regard to the extent of that person's responsibility for " the damage."

The servant of a coal merchant delivering coke at the house of R. on the instructions of R.'s servant opened a cellar flap in the pavement opposite R.'s house and left it open and unguarded for a short time. The plaintiff fell into the opening and was injured.

In third-party proceedings between joint tortfeasors for an indemnity or contribution :—

Held, that on the true interpretation of the sub-section the Court, exercising a judicial discretion, had to determine what, on the facts, was a fair division of responsibility between the parties, and on that basis the damages should be apportioned as to nine-tenths against the coal merchants and one-tenth against R.

THIRD-PARTY proceedings by joint tortfeasors (the defendants in an action for damages for personal injuries) for an indemnity or contribution under s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935.

The proceedings arose out of an action brought by Miss Daniel, a lady seventy-eight years of age, living in Ashburn Gardens, London, S.W., against Messrs. Rickett, Cockerell & Co., Ld., coal merchants, and Mr. William Raymond Raymond, of 12, Ashburn Gardens. The plaintiff alleged that on April 20, 1937, a carman in the employ of the first defendants, while delivering coke at the residence of the second defendant, and on the instructions of a servant or representative of the second defendant, raised an iron plate or cellar flap in the pavement in front of the second defendant's residence in order to gain access to the coal cellar beneath ;

that the defendants failed to fence or otherwise guard the hole in the pavement or to warn the plaintiff of the danger; and that in consequence the plaintiff fell into the hole and suffered serious injury.

The Court found for the plaintiff against both defendants and awarded 800*l.* damages. Hilbery J. held that while the carman of the first defendants, in failing to take the necessary precautions to safeguard the users of the pavement, had been guilty of the negligence which caused the accident, the second defendant, through his representative, had directed the carman to open the cellar flap and do the very thing which had created the danger in the highway. Therefore, following the decision in *Pickard* v. *Smith* (1), he held that both defendants were liable.

By the third-party proceedings each defendant claimed against the other an indemnity or, alternatively, a contribution towards the damages for which such defendant might be held liable to the plaintiff.

F. S. Laskey for the first defendant. In removing the iron plate for the purpose of delivering the coke into the cellar the carman was in fact acting as a servant of the householder. The coal merchant is entitled to be indemnified. If not, it is for the Court to decide, under s. 6, sub-s. 2, of the Act of 1935, in what proportions the damages and costs ought to be borne, and I submit that the apportionment ought not to be less favourable to the first defendants than half and half; because, although it may be that the most common practice is to deliver coal through the cellar flap, there are other methods. It is a matter of complete indifference to the coal merchant which method is adopted, and the opening and use of the coal flap was at the request and for the convenience of the householder.

Hon. Quintin McG. Hogg for the second defendant and third party. I am entitled to use the coal hole to my house, and it is plain that in doing so I was not doing an unlawful act. It was only rendered unlawful by the manner in which it

(1) (1861) 10 C. B. (N. S.) 470.

1938

DANIEL
v.
RICKETT,
COCKERELL
& CO.
AND
RAYMOND.

was done by the carman. My request to the carman to lift the cellar flap was a request which I might lawfully make. There rests a legal liability upon me, as the Court has held, as against the plaintiff, but there was no fault on my part. The servant of the coal merchant was under an obligation to me to take proper precautions to safeguard the users of the pavement. I was entitled to trust him to take those precautions; he did not; he committed a breach of duty towards me, and I am entitled to an indemnity, or at least to a substantial contribution.

HILBERY J. I think the answer to the first part of the very interesting and able argument addressed to me by Mr. Quintin Hogg, in respect of his claim on behalf of the second defendant for a complete indemnity, is to be found in the facts of this case. He bases that claim, as I understand it, on these grounds: that the act which the second defendant delegated to the first defendant, the coal merchant, was of itself a lawful act, and, secondly, that it only became an unlawful act because it was done negligently by the first defendant's carman, and that it was through the carman's collaterally negligent act in doing that which the second defendant had delegated to be done that the mishap overtook the plaintiff. I think the answer to that is to be found in the decision which I have given as between the plaintiff and the defendants, because I decided, and as far as I am concerned it concludes the matter, that the second defendant had in fact directed the coal merchant, the first defendant, to come and deliver the coal, to open the cellar flap in the pavement, and through the opening thus made in the pavement to deliver that which the coalman had to deliver at the premises. In those circumstances I am able to use words in connection with this case which can be taken practically verbatim from the judgment given in *Pickard* v. *Smith* (1), as follows: "The defendant employed the coal merchant "to open the trap in order to put in the coals; and he trusted "him to guard it whilst open, and to close it when all the

(1) (1861) 10 C. B. (N. S.) 470, 480.

"coals were put in. The act of opening it was the act of "the employer, though done through the agency of the coal "merchant; and the defendant, having thereby caused "danger, was bound to take reasonable means to prevent "mischief." There was, therefore, in this case, a tortious act done by the second defendant, in that, through the agency of the coalman, he caused the flap to be removed and an opening to be made in the highway, which was one of the causes of this lady's disaster.

It is true that the negligent acts of the first defendants' carman, once the flap was open, were also causes without which the disaster to the plaintiff would not have occurred, and they were the acts of omission which finally led to the disaster to the plaintiff, because although the opening of the cellar flap created a danger in the highway, it was a danger any ill results of which could have been avoided by the exercise of reasonable care on the part of the coal merchants' man.

That view of the case seems to me to take it out of the realm of purely vicarious responsibility as far as the second defendant is concerned. He is not being made responsible in this case, nor has judgment been passed against him, merely because the coalman failed to take reasonable precautions, once the flap was open, to safeguard the foot-passengers lawfully using the pavement; but he is responsible, just as the defendant was in the case of *Pickard* v. *Smith* (1), upon the basis that I have just mentioned. It is not, therefore, a case merely of vicarious responsibility. I think that is the answer to the first part of Mr. Quintin Hogg's argument for indemnity.

In the second place Mr. Quintin Hogg says that under The Law Reform (Married Women and Tortfeasors) Act, 1935, by s. 6, sub-s. 2, it is provided that: "In any proceedings "for contribution under this section the amount of the con-"tribution recoverable from any person shall be such as may "be found by the court to be just and equitable having "regard to the extent of that person's responsibility for

---

(1) 10 C. B. (N. S.) 470.

"the damage; and the court shall have power to exempt any "person from liability to make contribution, or to direct "that the contribution to be recovered from any person shall "amount to a complete indemnity." I am told that nobody, up to the present, has decided what is the proper interpretation to put upon the words "just and equitable," appearing in that sub-section. We are not unaccustomed to finding the word "just" in a statute. "Just and convenient" is an association of words which occurs in another very well known statute, and has received judicial interpretation, and as a result of that judicial interpretation has had certain limits placed upon it. I must, therefore, do what I can to construe those words, "just and equitable," having regard to the context in which I find them, and I cannot believe that they are intended to be used here strictly as terms of art. When I see those words are coupled with "having "regard to the extent of that person's responsibility," I think the meaning of the sub-section is that exercising a judicial discretion in the matter I am intended to do that which I think is right between the parties, having regard to what I think, on the true facts of the case, is the fair division of responsibility between them. As a lawyer I am not very happy in giving such an interpretation to a statute, I confess; but I believe that that is the intention of the sub-section. If it is, what was the extent of the responsibility for this mishap attaching to each of these parties, the coal merchant and the householder? Part of the business of a coal merchant in London is the delivery of coal to a house, and, although I have not seen the contract in this case, I think I should not be straining my powers if I assumed that the coal had been ordered by the householder in the ordinary way, which included delivery. The carman arrived with the coal. The man in charge of this load was sent alone by the coal merchant, probably as a matter of business economy. He came to this house in London to deliver the coal in a way in which one has been accustomed to see coal delivered in London ever since one can remember. The coalman, on presenting his ticket, had the coal flap to the cellar of that house pointed out to him, and as the coal flap was not fastened he was directed to put the coke through that coal flap. He lifted the coal flap, being directed so to do. Speaking as a matter of common-sense, I doubt whether any householder in the world would dream of going out to see that the coal merchants' man took precautions to safeguard foot-passengers coming along the road against putting a foot or a leg down the hole formed by the removal of the cellar flap. If I am to consider degrees of responsibility, it seems to me common-sense that no householder would think he had much to do with that; but whether he would think so or not, the fact remains that in law, as he has contracted for something to be done on the highway which must create a dangerous situation, unless precautions are taken, he is under a liability to see that such precautions are taken as are reasonable precautions for the safeguarding of foot-passengers. However often he, like many others, may neglect to do that, the fact remains that in the eyes of the law he has some responsibility for seeing that precautions are taken for safeguarding foot-passengers against the danger which he has directed shall be created.

I cannot think, however, that the degree of responsibility in those circumstances would be other than a small one, because, although that which the householder directed should be done must create a danger, in so far as it results in there being a hole in the highway, it need not, if proper precautions are taken, result in any danger to anybody who was taking reasonable care for his own safety.

I think it is true, as Mr. Quintin Hogg has submitted, that the householder in the circumstances delegates to a person who should have had, and presumably had, knowledge of how to deliver coal in this way. The householder reasonably expects him to take the reasonable precautions, and the responsibility rests far more on the coal merchant who, in such circumstances, does not take reasonable precautions to safeguard foot-passengers after the cellar flap has been opened, than it rests upon the householder who merely says: "There "is the cellar flap; open it and put the coal in."

In the circumstances, although I am of the opinion that the

1938

DANIEL
v.
RICKETT,
COCKERELL
& CO.
AND
RAYMOND.

Hilbery J.

second defendant has not a right to indemnity, under the section, I have to fix the contribution "having regard to the "extent of that person's responsibility for the damage," and I think that the second defendant's responsibility is rightly to be fixed at one-tenth, as against nine-tenths for the first defendants.

It is submitted by Mr. Quintin Hogg that once it was found that the act of opening the cellar flap at the direction of the householder was within the scope of the authority delegated to the coal merchant, there was on the pleadings as they stood nothing that entitled the first defendants to resist any longer the second defendant's claim for complete indemnity; but I think in this case, having regard to the specific allegation which the first defendant makes against the second defendant, it is still open to the first defendant to say that he is entitled to a contribution, as he does say, and as I have found.

The only other thing I have to deal with is the question of the costs of the second defendant in defending the action, and the costs of the third-party proceedings. As far as the costs of defending the proceedings are concerned, of course, I cannot grant the indemnity because I have found that the first defendant is entitled to a contribution as against the second defendant and there was a division of responsibility between them, and in those circumstances it does not seem to me that it would be right to say that the first defendant should pay the second defendant's costs of defending the action; I think those costs should fall upon the second defendant himself.

We now come to the question of the costs of the third-party proceedings. I direct that the second defendant is to have nine-tenths of the costs of the proceedings as between him and the first defendant.

Solicitors for first defendants: *Withall & Withall.*
Solicitors for second defendant: *Westbrook & Co.*

A. W. G.

TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION.

C. A.
1937
Oct. 13;
Nov. 22.

[1936. T. No. 974.]

Practice—Libel—Plea of fair comment—"Rolled-up plea"—Fair comment on "the said facts"—Particulars—Whether necessary to distinguish between allegations of fact and comments—Whether necessary to specify facts forming basis of comments.

Where the defendants to an action in the High Court make a counterclaim for damages for libel, and the plaintiff in his reply and defence to the counterclaim relies upon the plea of fair comment in the form known as the "rolled-up "plea," i.e., "In so far as the said words complained of are "statements of fact they are true in substance and in fact, and "in so far as they are expressions of opinion they are fair comment "upon the said facts which are a matter of public interest," the Court will not order the plaintiff to deliver particulars stating which of the allegations in the words complained of he relies on as being statements of fact, and which as being expressions of opinion; nor will the Court order him to give particulars of the facts on which he relies as being the basis of his comments, where the plea, as above, limits those facts to "the said facts."

So *held* by the Court of Appeal, reversing the decision of du Parcq J.

Aga Khan v. *Times Publishing Co.* [1924] 1 K. B. 675 followed.

Views expressed in *Digby* v. *Financial News, Ld.* [1907] 1 K. B. 502, 508 and *Sutherland* v. *Stopes* [1925] A. C. 47, 62, 77, 99, adopted.

Observations of Atkin L.J. in *Hobbs* v. *The People Newspaper Publishing Co.*, Times Newspaper, March 30, 1926, considered and not applied.

APPEAL from an order of du Parcq J. at Chambers.

The British Union for the Abolition of Vivisection (hereinafter called "the union"), was an association having as its principal objects to oppose the practice of vivisection and to secure its abolition, and it was incorporated under the Companies Act, 1929, as a company limited by guarantee and not having a share capital.

In July, 1933, Mr. Ernest Percyval Tudor-Hart, at all material times president of the West End branch of the union, brought an action in the Chancery Division of the High Court on behalf of himself and all members of the union other than those sued, against the union and seven members thereof, who were also members of its executive committee or officials, claiming relief in respect of alleged breaches by the defendants of the memorandum and articles of association of the union; and in February, 1934, in that action Bennett J. made an order by consent declaring that the union was not entitled to pay to any member of the general council or of the executive committee any remuneration or benefit other than such as were expressly permitted by the memorandum of association, ordering that an account be taken of all moneys received or receivable in contravention of the memorandum of association out of any payments made by the union, and that repayment be made to the union of moneys which by the account should appear to have been so received.

In another action in the Chancery Division brought by Mr. A. A. MacGregor against the union and members of its executive committee in respect of his alleged illegal expulsion from the union Bennett J. gave judgment in favour of Mr. MacGregor.

In the issue of the union's publication called the "Abolitionist" for March, 1934, some account was given of these Chancery actions.

In May, 1934, Mr. Tudor-Hart sent by post to every member of the union a printed leaflet (1) which alleged (inter alia) that the wholly misleading account in the March issue of the "Abolitionist" of these actions, which the union had lost, added to the misrepresentation of the facts to members and branches by certain officials since the cases, made it incumbent to inform the members of the true position; and the leaflet then proceeded to allege a number of irregularities and abuses by certain of the union's officials.

The annual report of the union for the year ending March 30, 1935, and a pamphlet referring to that report each contained a statement purporting to be a brief account and explanation by the executive committee of the union to its members of the Chancery cases.

Mr. Tudor-Hart further sent by post to the secretary of the union a letter (1) dated October 13, 1935, in which he stated that in reading through the said annual report he was amazed at the statements made in it with regard to the law cases; that there was a form of misrepresentation and prevarication which was more baneful and despicable than the direct lie, and that that portion of the annual report which dealt with the law suits was of that nature; and the letter then proceeded to allege a number of misrepresentations, prevarications and irregularities by certain officials of the union.

---

(1) The leaflet is set out in full in Note I. at the end of this report. See p. 337, infra.

On June 24, 1936, Mr. Tudor-Hart (hereinafter called "the plaintiff"), brought the present action against the union, Mr. Ernest Heys-Jones, the Rev. Walter M. Long, Messrs. P. H. Hill and Clayton Rickard, all members of the central executive committee of the union, Miss Beatrice Ethel Kidd, the honorary secretary of the union, and Deverell, Gibson & Hoare, Ld., printers, claiming damages for libel, the statements of which he complained as defamatory of him being statements contained in the above mentioned annual report and pamphlet.

The union, the Rev. Mr. Long, Mr. Hill, and Miss Kidd (hereinafter called "the defendants"), delivered a defence and counterclaim, stating (inter alia) in the defence that they denied that by the words of the report and leaflet they meant what was alleged by the plaintiff, and in the counterclaim (para. 11) that the plaintiff falsely and maliciously wrote and published or caused to be printed and published of and concerning these defendants, and of and concerning the defendants Long, Hill and Kidd in the way of their said offices and in relation to their conduct therein: (A) the said leaflet (2), the words of which were in the counterclaim set out at length, and (B) the letter (1) dated October 13, 1935, from the plaintiff to the secretary, the words of which were also therein set out at length; (para. 13) that by the words of these documents the plaintiff meant and intended and was understood to mean that the defendants Long, Hill and Kidd were fraudulent and dishonest persons who were totally unfitted to guide or to take any part in guiding the destinies of the defendant union, and that the defendant union as at all material times controlled was undeserving of the support of any person having the interests of animals at heart; and that these defendants counterclaimed damages.

---

(1) The letter is set out in full in Note II. at the end of this report. See p. 340, infra.

(2) The leaflet is set out in full in Note I. at the end of this report. See p. 337, infra.

The plaintiff delivered a reply in which (inter alia) as to the defence he said that he joined issue, and as to the counterclaim he said (para. 7) "in so far as the said words complained of "in para. 11 (A) and (B) [of the counterclaim] are statements of "fact they are true in substance and in fact, and in so far as "they are expressions of opinion they are fair comment upon "the said facts which are a matter of public interest."

On May 21, 1937, the defendants' solicitors wrote to the plaintiff's solicitors asking for particulars of para. 7 of the reply and enclosing a list of the required particulars. (1)

The plaintiff declined to give these particulars.

On June 4, 1937, the defendants took out a summons calling upon the plaintiff to attend the Master in Chambers on the hearing of an application on the part of these defendants for delivery of particulars (1) of para. 7 of the reply.

On July 5, 1937, Master Simner made an order refusing to order delivery of the particulars asked for and dismissing the summons.

The defendants appealed to the judge in Chambers.

On July 16, 1937, du Parcq J. made an order referring the application of the defendants back to the Master with a direction that the plaintiff was to give to the defendants full particulars of the allegations of fact contained in the libel alleged in the counterclaim which were intended to be comprised in the expression "the said facts" in para. 7 of the reply.

The plaintiff appealed to the Court of Appeal.

Theobald Mathew for the plaintiff, appellant. The defendants are not entitled to the particulars for which they ask, and the order of du Parcq J. requiring the plaintiff to give these

---

(1) These particulars are set out in full in Note III. at the end of this report. See p. 342, infra.

C. A.
1937

TUDOR-HART
v.
BRITISH UNION FOR THE ABOLITION OF VIVISECTION.

particulars was wrong and should be set aside. The defendants make a counterclaim against the plaintiff for damages for libel and the plaintiff in para. 7 of the reply relies upon the plea of fair comment in the form generally known as the "rolled-up plea"—namely, that in so far as the words complained of are statements of fact they are true, and in so far as they are expressions of opinion they are fair comment on a matter of public interest, and he further relies upon that plea in the particular form in which it asserts that in so far as the words are expressions of opinion they are fair comment upon "the said facts." A party relying upon such a plea in answer to a claim for libel cannot be ordered to specify which of the allegations in the libel he relies upon as expressions of fact and which as expressions of opinion, nor will the Court require him to give particulars of the facts on which he relies as the basis of his comments, as the plea in this form limits these facts to "the said facts" and the applicant is already given all the information he can require: *Aga Khan* v. *Times Publishing Co.* (1); and see also *Sutherland* v. *Stopes* (2) and *Digby* v. *Financial News, Ld.* (3) In *Municipal Mutual Insurance Co.* v. *Policy Holders Journal* (4) the Court of Appeal no doubt ordered particulars to be given under such a plea; but the circumstances of that case were peculiar and the order there made is not to be regarded as a precedent for other cases: per Bankes L.J. in the *Aga Khan* case (1); and see Fraser on Libel and Slander, 7th ed., p. 264.

G. O. Slade for the defendants, respondents. The defendants are entitled to the particulars asked for, and the order of the learned judge should be affirmed.

In a case of this kind it may sometimes be doubtful whether or not an order for particulars should be made; but it is highly important that an order should not be refused in a case in which it ought to be made. The defendants only ask the plaintiff to give particulars of expressions in the alleged libels which are ambiguous and indefinite, and of these particulars should be given. The plaintiff should be ordered to say which

(1) [1924] 1 K. B. 675.
(2) [1925] A. C. 47.
(3) [1907] 1 K. B. 502.
(4) 1923, July. Not reported.

C. A.
1937

Tudor-Hart v. British Union for the Abolition of Vivisection.

of the allegations in the alleged libels are allegations of fact, and which of opinion. He should also be ordered to give particulars of "the said facts" upon which the expressions of opinion are alleged to be based. It may be of great assistance to the complainant in preparing his case, and also to the judge and jury at the trial, to have beforehand the plaintiff's considered statement in regard to all these matters. The cases of *Aga Khan* v. *Times Publishing Co.* (1); *Sutherland* v. *Stopes* (2); and *Digby* v. *Financial News* (3) no doubt decide that a party who in answer to a claim for libel relies upon the rolled-up plea of fair comment cannot be required to give particulars of that plea, where it is possible for the judge or jury readily to decide whether the allegations in the statement complained of are allegations of fact or of opinion, or what are the facts upon which the expressions of opinion are based; but these cases have no application to the present case, because here it does not appear either from the alleged libels or from the plea of fair comment which of the allegations are allegations of fact or which of opinion, nor does it appear on what facts the expressions of opinion are based. In *Hobbs* v. *The People Newspaper Publishing Co., Ld.* (4), Atkin L.J. said in the course of his judgment that if a libel stated that a man was a murderer and the party publishing it relied upon a plea of fair comment in this form, it would be monstrous not to order him to give particulars of that plea before trial; and the same rule should be applied in all serious cases of libel. Even in the *Aga Khan* case (1) itself, Scrutton L.J. stated that if he had not been hampered by authority he would have been inclined to say in every case in which the rolled-up plea was pleaded that the complainant was entitled to ask the other party to specify the statements of fact which he said were true, and the comments which he said were fair.

[Slesser L.J. It would seem to have been already decided in *Lyons* v. *Financial News* (5) that in such a case as this an order for particulars ought not to be made.]

Cur. adv. vult.

---

(1) [1924] 1 K. B. 675.
(2) [1925] A. C. 47.
(3) [1907] 1 K. B. 502.
(4) Times Newspaper, Mar. 30, 1926.
(5) (1909) 53 S. J. 671.

1937. Nov. 22. The judgment of the Court (Greer, Slesser and Scott L.JJ.) was read by Greer L.J. as follows :—

GREER L.J. I have written the judgment in this case, and my brethren agree that that judgment should be taken as the judgment of the Court.

This is an appeal from the order of the judge in Chambers whereby he reversed an order made by the Master and referred the matter to the Master with a direction that the plaintiff (who is defendant to a counterclaim for damages for libel) is to give to the defendants full particulars of the allegations contained in the libel alleged in the counterclaim which are intended to be comprised in the expression "the said facts" in para. 7 of the reply. The plaintiff by his counsel asks this Court to decide that the order of the judge should be reversed, and the order of the Master restored, on the ground that the order made by the judge is contrary to a well established rule of law. It seems desirable that we should state in some detail how the question involved in this appeal has arisen.

The plaintiff brought an action for libel against the British Union for the Abolition of Vivisection and named members of the committee, the secretary of the union, and the printers of the alleged libel. The defendant union and the defendants Long, Hill and Kidd delivered a defence and counterclaim. By their counterclaim they claimed against the defendant (that is to say, the plaintiff in the action) damages for libel. By his reply the plaintiff (inter alia) pleaded what has become known as the "rolled-up" plea of fair comment. This plea is in the words following: "Further or alternatively in so far "as the said words complained of in para. 11 (a) and (b) "are statements of fact, they are true in substance and in "fact, and in so far as they are expressions of opinion, they "are fair comment upon the said facts which are a matter of "public interest."

On May 21 of this year the said defendants asked for certain particulars of the allegations relied on to prove certain specified statements contained in the alleged libel. In our judgment the Master's order was right, and the judge's order was contrary to a well established rule of law, and even if we thought the rule so established produces a result that is neither reasonable nor just, we are still bound to follow a rule of law established by decisions of this Court and the House of Lords. In our judgment this Court ought to hold itself bound by the opinion expressed by Lord Collins M.R. in *Digby* v. *Financial News, Ld.* (1), by Lord Shaw and Lord Carson in *Sutherland* v. *Stopes*, (2) and by the decision of the Court of Appeal in *Aga Khan* v. *Times Publishing Co.* (3) We think we are bound, by the decision of the Court of Appeal in *Aga Khan* case (3), to hold that a defendant pleading the rolled-up plea cannot be ordered to deliver particulars stating (1.) which of the statements in the words complained of the defendant relies on as statements of fact, and which as being expressions of opinion; (2.) nor can the Court order such defendant to give particulars of the facts he relies on as being the basis of his comments, if the plea limits those facts to the said facts.

In our judgment, the questions in this appeal have been determined adversely to the respondents in the *Aga Khan* case (3), and the appeal must be allowed.

Mr. Slade, for the respondents, relied on an expression of opinion by Lord Atkin in a case of *Hobbs* v. *The People Newspaper Publishing Co., Ld.* (4) In the course of the argument Lord Atkin, then Atkin L.J., said: "Assume it was said that a "man was a murderer and ought not to be a member of a decent "profession, that fair comment was pleaded in the public "interest, and that it was then said, 'I am going to trial and "'not going to give you any particulars. He is a murderer, "'and at the trial I will prove this,' that would be monstrous." In that case the only order made by the Court was that the appeal be adjourned sine die to enable the defendant to amend the statement of defence. The view stated by Lord Atkin during the argument was an obiter dictum, but in all probability one to which, if he had to give judgment, he might not have adhered. If the question we have to determine here were free from authority, the inclination of our minds would be in the same direction as that indicated by Scrutton L.J.

---

(1) [1907] 1 K. B. 502.

(2) [1925] A. C. 47.

(3) [1924] 1 K. B. 675.

(4) Times Newspaper, March 30, 1926.

C. A.
1937

TUDOR-HART
v.
BRITISH UNION FOR THE ABOLITION OF VIVISECTION.

in his judgment in the *Aga Khan* case (1), and the proposition implied in the words of Lord Atkin above quoted, but we are clearly of opinion that this Court is bound by authority to hold that the order appealed from was wrongly made and must be reversed.

We think that the application for particulars was objectionable, as it took the form of a request for evidence such as met with the disapproval of Bankes L.J. and Sargant L.J. in the *Aga Khan* case. (1)

The order will be that the order of the judge in Chambers be reversed, the order of the Master restored, and that the respondents pay the costs here and below.

Appeal allowed.

NOTE I.

FOR MEMBERS OF THE BRITISH UNION ONLY.

From—Mrs. Keith MacKenzie, Major Austin and Mr. Tudor-Hart.

POSITION OF BRITISH UNION.

In February, 1934, Mr. Justice Bennett delivered judgment with costs against the British Union in two actions. The plaintiffs in the two actions were Mr. Ernest Percyval Tudor-Hart and Mr. Alasdair Alpin MacGregor. The former sought to restrain the union from continuing illegally to make payments, contrary to the union's rules, to certain persons, who attended council meetings as delegates, or sat upon the executive committee. He also challenged the validity of the membership of committee of at least one person sitting thereon at a time when she was a member of another anti-vivisection society, contrary to the rules. Mr. MacGregor's action concerned his illegal expulsion from the union by a committee specially packed for the purpose. In neither of these actions would the union's officials face the witness-box. The wholly misleading account in the March issue of the "Abolitionist" of these actions, which the British Union has lost, added to the misrepresentation of the facts to members and branches by certain "officials" since the cases, make it incumbent upon us to inform the members of the true position. This is all the more necessary since Mr. MacGregor has been obliged to serve a further writ upon the union for a second alleged illegal expulsion and damages, and also for libel and damages. Briefly stated, Mr. MacGregor commenced an action against the union for wrongfully "expelling" him at a packed committee meeting in March, 1932. This was the outcome of his repeated protestations against certain irregularities affecting the moneys of the society, protestations of which he was not the originator, but which had been simmering for years before he joined the executive committee. In order to get rid of him at a time when the majority of the committee was in agreement with him in his demand for constitutional control of the union's finances, the officials resorted to packing the committee with persons described by Mr. Justice Bennett in the Chancery Court as "strangers" to the committee. No fewer than five persons who voted for this bogus "expulsion" were declared to have sat illegally, including Mr. Heys-Jones, who has been taking out of the union's funds moneys to which he was not entitled, and which the Court has ordered him to repay to the union. For more than two years, in committee and at council meetings, Mr. MacGregor and those associated with him in the fight to protect the society against the illegal excesses of certain officials ceaselessly endeavoured to settle these matters amicably within the union itself, without recourse to the painful publicity of the Law Courts. It will not be forgotten that resolutions were submitted to two successive council meetings affecting these matters, and also the matters raised by Mr. Tudor-Hart in his action. The branches submitting them were ruthlessly insulted. Council meetings were illegally packed by the union's officials, and at the union's expense, to prevent matters relating to these irregularities being discussed at all. Delegates attending the council meetings in 1932 and 1933 will remember the insistence with which Mrs. MacKenzie, then a member of the executive committee, repeatedly sought explanations, through the chairman, with regard to the society's moneys, especially in relation to the item shown as "professional expenses." Explanations were refused, as they had been to similar inquiries made by her and by Major Austin on numerous occasions in committee. No satisfactory information on the moneys could be obtained from the responsible officials, even by members of committee, who not only are entitled to such information, but are responsible to the union, and in duty bound to be in possession of it. It was alarming to those conscientiously interested in the proper government of the union that every month a sum of no less than 300*l.* was voted the secretary for "petty cash," that any legitimate question on the moneys, courteously asked at committee meetings, evoked united insult and opposition from chairman, honorary secretary and from the solicitor posing all these years as an "honorary" solicitor. The committee for years has been kept in ignorance as to the true state of the union's finances. In Mr. MacGregor's case, Mr. Justice Bennett entered judgment for him, declared the "expulsion" to be irregular, invalid, and of no effect, awarded him the nominal damages of 40*s.* for which he asked, and also costs against the union. The judge pointed out, as may be seen from the verbatim report of the proceedings, that one cannot expel a man from a society without leaving a stigma upon him, even if the expulsion were legal, which this one was not. When it transpired during the proceedings that the officials of the union, knowing well the first expulsion to be a bogus one, had gathered themselves together last December to carry through a second expulsion of Mr. MacGregor while these cases were pending, Mr. Justice Bennett showed considerable surprise, and later he announced that Mr. MacGregor would contest the validity of the second expulsion in the only way open to him, namely, in a further action. As already stated, Mr. MacGregor has commenced further proceedings against the union. At present we cannot therefore comment on this matter, as it is sub judice. The union's officials, in order to cover up their irregularities, resorted with renewed energy to a practice of which they have been guilty for years—that of packing council meetings with spurious delegates. This was accomplished largely by the misuse of the paid organisers, and by other irregularities. Propaganda by these organisers was strenuously carried on among the branches for months beforehand. These organisers themselves acted illegally as delegates to swell the vote for the officials in their irregular conduct of the society's affairs. The Court held that the paid officials had never at any time been legally members of the council. Convenient delegates were brought to represent dead branches, and branches conveniently created out of six or seven members sent two of their number to council meetings to swell the vote as required. In a very substantial number of cases these delegates were not even elected by their respective branches in accordance with the union's rules. The British Union owes to Mr. Tudor-Hart a debt of gratitude for his having terminated by his legal action the abuse of using the paid officials as delegates to council meetings. The most serious aspect of the case is that of Mr. Heys-Jones, who was ordered by the Court to repay to the union moneys he had wrongfully been taking for years while posing as our "honorary" solicitor, and who actually had in his possession two years previous to these actions a legal opinion, taken we presume at the society's expense, pointing out that the taking of these moneys by him was illegal. This document was secreted from the committee, and from the council by Mr. Heys-Jones. The statement in the March issue of the "Abolitionist" that Mr. Heys-Jones ceased to take further moneys out of the union's funds as stated is false. The rule forbidding his doing so is insisted on by the Board of Trade, and was actually drawn up by Mr. Heys-Jones himself at the time of incorporation. It has been deliberately omitted from the copies of the rules given out to members of the society, and this omission has misled not only the committee, but also the members of the association and the branches. Though on several occasions Mr. Heys-Jones was challenged on this very rule, even on committee, notably by Mr. MacGregor at his bogus "expulsion" meeting, and by Mrs. MacKenzie, he was more insistent than any of his friends in ruling any comment out of order, both at committee and council meetings. Though Mr. Tudor-Hart and Mr. MacGregor were awarded the costs of these actions against the union, they have met out of their private purses considerable legal expenses incurred before these actions actually came into Court. The protection of our union against the continuance of these abuses has been their one concern, and they have grudged neither time nor money. Mr. MacGregor demonstrated his "esprit de corps" and forbearance by deferring for two years his appeal to the Courts for the righting of an outrageous wrong done him. But the question now arises as to whether branches and members will permit a body of officials to cover up their misdemeanours (*sic*) by impoverishing our society to the extent of some hundreds of pounds of legal costs which would never have been incurred, and could have been saved, if they had acted constitutionally and honourably. As it can be proved that these heavy costs have been incurred against the union by certain officials knowingly acting defiantly and irregularly on their own account, we presume that they intend to meet every penny of the union's costs out of their own pockets, and not out of the funds subscribed, often in great hardship and self-denial, for the defence of animals against vivisection. Any attempt by the officials to take one farthing of these legal costs out of funds belonging to the animals must be met by the most strenuous opposition.

---

(1) [1924] 1 K. B. 675, 681, 684.

Louise MacKenzie.
Reginald Austin.
P. Tudor-Hart.

NOTE II.

Leo Rodenhurst, Esq., October 13, 1935.
Secretary of The British Union for the
Abolition of Vivisection,
47, Whitehall, S.W.1.

Dear Sir,

Having but recently returned from Canada I have only now seen the Annual Report for 1935 of the British Union for the Abolition of Vivisection. In reading through this document, I am amazed at the statements made in it with regard to the law cases. There is a form of misrepresentation and prevarication which is more baneful and despicable than the direct lie, and that portion of the annual report which deals with the law suits is of this nature. As regards the personal charges made against me, implying that I took action against individual members of the union, in order to obtain the refunding of their salaries, this is neither in accordance with the facts, nor true of my intentions. I took action solely against the executive committee for persistent violation of para. 4 of the memorandum of association of the company, one of the regulations of the Board of Trade, under which our licence had been granted, and to prevent them from continuing so to do. The paragraphs of the memorandum (which were most important) had been excluded from the abridged memorandum bound in red in consequence whereof the members of the association were kept in the dark as to the provisions insisted on by the Board of Trade in respect of their licence had to be circulated to the members and branches. The cases of the three branch secretaries, organiser and a van driver, were together with the honorary solicitor, concrete cases it was necessary to adduce in support of the action. Far from wishing to make unfortunate persons pay for the irregularities of which the executive committee was responsible, I readily agreed in Court that the voting of these individuals should be treated as null and void to avoid their having to refund their salaries. I may here state that there had been no meetings held by the branches who supplied delegates for two years as disclosed in the action. As regards the honorary solicitor, the words quoted from the annual report "as "soon as the honorary solicitor realised that, as a member of the "executive committee he was not entitled to share any of these "payments he offered to refund all that he had received in that way" are themselves sufficient condemnation of his behaviour to any clear-thinking person, in view of the fact that the hon. solicitor himself drew up the Rules and Regulations of the B.U.A.V. in collaboration with counsel, and the further fact that he did not refund one penny until he had been ordered to do so by the Court is sufficient justification for my taking this action. As regards Miss Gyllencreutz, the statement is not only intentionally misleading, but a deliberate falsehood. I brought no action against this lady personally. I took action, in fact against the executive committee for having infringed the fundamental rule of the association by irregularly co-opting her a member of that body and maintaining her in that position, when whole branches have in the past, been expelled under this rule. In consequence I had to cite Miss Gyllencreutz as one of the defendants not entitled to act as a member of the executive committee. I agree with the executive committee in regarding this case as a most regrettable waste of the British Union funds, nor would it have occurred had not the executive committee, for three years in succession taken every means in its power to prevent the irregularities of its behaviour being disclosed and discussed before the council meetings. When these matters were raised by delegates the chairman and the honorary solicitor assured the council meetings that no irregularities had occurred and that all was legally in order until they had to answer for them before a Court of Justice. Then they tried to settle the action out of Court, shortly before the trial, but not succeeding, instead of substantiating their statements before the council meetings by producing evidence in Court of the correctness of their behaviour, they admitted all the charges and stood self-convicted. The responsibility for the waste of the British Union funds is therefore in this respect unquestionably theirs. It is not true that the offer made to me by the union's solicitors was on exactly the same lines as the settlement reached in Court, and I challenge the executive committee to publish in extenso their solicitors' letter of offer and my reply thereto and the judge's remarks thereon. Moreover the action was brought by plaintiff as a member of the society and for the society, and the suggested settlement made by the B.U.A.V. solicitors would not have had the effect of the decision of the Court as to the proper construction of the union's memorandum. That I was right not to put faith in the bona fides of this personal offer has since been substantiated by the executive committee making no attempt to carry out the ruling of the Court until the Board of Trade threatened to withdraw the union's licence if they did not immediately comply. Had I accepted their offer, I should have been without means of forcing them to carry out their obligations which has necessitated both a Court ruling and the insistence of the Board of Trade to obtain. The further plea that there was no need for having recourse to the Law Courts is of the same order as the above mentioned offer. The judge held that there was. The executive committee by its persistent denial of the existence of irregularities obstructing and preventing any discussion thereon, ruling out of order all resolutions appertaining thereto, circularising the branches against all members seeking to right these now avowed irregularities, declaring such

C. A.
1937

Tudor-Hart v. British Union for the Abolition of Vivisection.

members subversive to their intentions had rendered obtaining the support of one-fifth of the branches for a special council meeting a foregone conclusion, and recourse to art. 51 inoperative. Thereby they closed the door to any hope of a settlement by the domestic tribunal and made recourse to the Law Courts the one and only means of obtaining a hearing and putting an end to the irregularities they had committed or sanctioned. Furthermore the breaking of clause 4 of the memorandum of association is not merely, as the annual report implies, a domestic matter, but a serious violation of the Rules of the Board of Trade which might entail the withdrawal of our licence. So, after myself and other delegates warning the executive committee at the council meeting of 1933 that paid officials were voting in contravention to clause 4 of the memorandum of association (as confirmed by the verbatim report) I took the only means left open to me, by the executive committee and appealed to the Law Courts. I may add that the unconcealed partiality of the chairman at the council meeting of 1933 was the direct cause of my taking immediate proceedings before a Court of Law without further attempts at conciliation. My action resulted in the executive committee admitting the irregularities which they had previously persistently and publicly denied under confirmation of the honorary solicitor, and in proper steps being taken to prevent their recurrence. This, I deem, amply justifies my action. If the executive committee is sincere in "regarding this case "as a most regrettable waste of the British Union funds" why have they not paid or offered to pay the B.U.A.V. costs out of their own pockets? It would have been but an equitable discharge of costs arising out of their admitted irregularities which, in conjunction with their previous denials and obstructions to investigation necessitated recourse to the law. That this executive committee should seek to put the blame for their own expending of the union's funds upon my shoulders by misrepresentation and suggestion is an outrage that I have every right to resent and oppose both in my official capacity of president of the West End Branch and as a life member of the union. I must ask you, therefore, to insert this letter in extenso in the next issue of the "Abolitionist" and to withdraw all imputations to avoid the association being put to further expense.

Yours faithfully,
(Signed) P. Tudor-Hart.

NOTE III.

Particulars required of Paragraph 7 of the Reply.

Of the facts relied upon to prove :—

Counterclaim paragraph 11 (A).

That the committee was specially packed. That the union's officials would not face the witness-box. That the account in the March issue of the "Abolitionist" was wholly misleading. That certain officials since the cases have misrepresented the facts to members and branches. That the committee meeting in March 1932 was packed. That Mr. MacGregor had made repeated protestations against certain irregularities. That the officials resorted to packing the committee.

That five persons voted for this bogus "expulsion." That certain officials committed illegal excesses. That Mr. MacGregor and those associated with him ceaselessly endeavoured to settle matters amicably. That council meetings were illegally packed by the union's officials. That Mrs. MacKenzie repeatedly sought explanations. That explanations were refused. That similar enquiries had been made by her and by Major Austin on numerous occasions in committee and explanations refused. That no satisfactory information could be obtained from the responsible officials even by members of the committee. That any legitimate question on the moneys evoked united insult and opposition from the chairman, honorary secretary and from the solicitor. That the first expulsion was a bogus one and that the officials knew it. That the officials had committed irregularities. That they packed the council meeting with spurious delegates. That they had been guilty of this practice for years. That they misused the paid organisers. That they committed other irregularities. That these organisers strenuously carried on propaganda. That they acted illegally as delegates. That the officials had conducted the society's affairs irregularly. That convenient delegates were brought to represent dead branches. That branches were conveniently created out of six or seven members. That these branches sent two of their number to council meetings. That in a substantial number of cases these delegates were not elected in accordance with the union's rules. That the statement in the March issue of the "Abolitionist" was false. That the rule was deliberately omitted from the copies of the rules given out to members. That a body of officials are attempting to cover up their misdemeanours. That the officials have acted unconstitutionally and dishonourably. That certain officials knowingly acted defiantly and irregularly on their own account.

Of the facts relied on to prove

Counterclaim paragraph 11 (B).

That the Annual Report for 1935 of the defendant Association contains misrepresentations and prevarications. That the executive committee persistently violated para. 4 of the Memorandum of Association of the defendant association. That the executive committee was responsible for irregularities. That the statement about Miss Gyllencreutz was not only intentionally misleading but a deliberate falsehood. That the executive committee had irregularly co-opted her a member. That the executive committee for three years in succession took every means in its power to prevent the irregularities of its behaviour being disclosed and discussed before the council meetings. That the executive committee made no attempt to carry out the ruling of the Court until the Board of Trade threatened to withdraw the union's licence. That the executive committee by its persistent denial of the existence of irregularities, obstructing and preventing any discussion thereon, ruling out of order all resolutions appertaining thereto, circularising the branches against all members seeking to right these now avowed irregularities, declaring such members subversive to their intentions, had rendered obtaining the support of one-fifth of the branches for a special council meeting a foregone conclusion. That the plaintiff and other delegates warned the executive committee at the council meeting of 1933 that paid officials were voting in contravention to clause 4 of the memorandum of association. That the executive committee admitted the irregularities. That they had previously persistently and publicly denied them. That the executive committee admitted irregularities. That they had previously denied them and obstructed investigation. That the executive committee were guilty of misrepresentation and suggestion.

Solicitors for appellant: *Deacon & Co.*

Solicitors for respondents: *Underwood, Barron & Heys-Jones.*

J. R.

RADCLIFFE *v.* RIBBLE MOTOR SERVICES, LIMITED.

C. A.

1937

Oct. 20, 21, 22; *Dec.* 20.

Master and servant—Common employment—Drivers of motor-coaches—Coaches engaged to carry three parties from a certain place to the same destination—Return journey to garage—Death of one driver owing to negligence of another driver—Liability of employers.

In every contract of service there is implied by law an undertaking by every employee that he accepts the risk of injury by the negligence of his fellow employees engaged in common employment with him.

In order to bring a case within the exemption from liability by reason of common employment it is not sufficient merely to show that the negligent employee and the one who is claiming damages based on that negligence were servants of a common master; it must be shown that the men were engaged in the same common work under a common employment. But two men may be in common employment, within the doctrine relating to common employment, even though they are working in different departments of duty.

Two employees together carrying out the same or similar orders of their employer in close juxtaposition to one another are engaged in common employment.

The defendants, who were motor-coach proprietors, in accordance with three contracts, supplied six motor-coaches to take three parties from Liverpool to New Brighton. The coaches picked up the excursionists at the same place and at the same time, took them to the Cathedral and waited until the three parties of excursionists had resumed their seats. The six coaches then went as a team through the Mersey Tunnel to New Brighton, where they discharged their passengers. The drivers' instructions were to return direct to the garage, but each driver could go by any route he chose. The coaches started to come back as a team; but there was some disorganization at the Mersey Tunnel. The deceased man R., after passing through the Tunnel, proceeded to take his coach back to the garage by a certain route, and he was followed by J., who was driving another coach, and by another driver. R.'s coach stopped, and R. got down to see what was wrong. J., who was behind R., endeavoured to get in front of R. and then to stop and go to R.'s assistance. J., however, did not see R., who was standing on the off-side of his coach, and unfortunately R. was crushed and received injuries from which he died. The trial judge found that the accident was due to the negligence of J. In an action brought by R.'s widow against his employers under the Fatal Accidents Acts:—

Held, by the Court of Appeal (reversing the decision of Hawke J.), that J. and R. were, at the time of the accident, not only in the employ of the same master, but were engaged in the same common work, and were therefore in common employment, and their employers were therefore exempt from liability.

Morgan v. *Vale of Neath Ry. Co.* (1864) 5 B. & S. 570 and *Tunney* v. *Midland Ry. Co.* (1866) L. R. 1 C. P. 291 applied and followed.

APPEAL from a decision of Hawke J. sitting without a jury at Liverpool.

The plaintiff, Ellen Veronica Radcliffe, suing as the administratrix of her husband, Eric Charles Radcliffe, deceased, brought the action under the Fatal Accidents Acts, for the benefit of herself as widow and for the benefit of his infant daughter. She also claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934.

In May, 1936, three associations applied to Dean & Dawson to supply them with coaches to carry their respective parties from Reece's Café, Parker Street, Liverpool, to the Liverpool Cathedral, and after they had seen the Cathedral to New Brighton, where they wished to be discharged from the coaches and did not require to be brought back again to Liverpool. Dean & Dawson applied to the defendant company, the Ribble Motor Services, Ld., for a quotation for the necessary coaches. The defendant company sent three quotations relating severally to the requirements of each association for one coach, one coach and four coaches respectively. The agreement concluded with regard to each of the coaches ordered was that they were to start at 1.40 P.M. from Reece's Café to the Cathedral. Before starting from the garage each of the drivers was instructed to start from Reece's Café on the journey to the Cathedral and thence to New Brighton. The coaches picked up the three parties of excursionists at Reece's Café and started off together at the same time, 1.40 P.M., and went to the Cathedral, and, after waiting until each of the three sets of excursionists were ready to resume their places in the coaches, they took them through the Mersey Tunnel to Birkenhead and thence via Seacombe and Egremont to New Brighton, where they discharged their passengers. The drivers' instructions as to the return journey were to return direct to the garage, though this was not upon their written instructions. The instructions with regard to the return journey, so far as they were in writing, were the same in the case of the deceased man, Radcliffe, and Jones, the driver of another coach. On the homeward journey each driver could go any way that he chose. All the coaches came back from New Brighton the same way to the entrance of the Tunnel at Birkenhead. They came back as a team as they had gone as a team, but there was some disorganization, first, at the entrance to the Tunnel, and secondly, in the course of going through the Tunnel, owing to the traffic lights. When the coaches emerged from the Tunnel the deceased man Radcliffe proceeded to take his coach by a route beginning at William Brown Street back to the garage. Jones and another driver followed him intending to go by the same route. After the deceased man Radcliffe had driven his coach a certain distance, his coach stopped, and he got down to see what was wrong. Jones, who was behind Radcliffe, endeavoured to get in front of him with the idea of stopping and seeing what was wrong and assisting in correcting what was wrong. Jones, however, did not see Radcliffe, who was standing on the off-side of his coach, and unfortunately Radcliffe was crushed and received injuries from which he died. The trial judge found that the deceased man Radcliffe had not been guilty of negligence, but that Jones was guilty of negligence, which was the cause of the accident.

The defendants by their defence raised the point that what happened was due not to the negligence of the defendants but to the negligence of a fellow workman of the deceased engaged in one common employment or service with the deceased under the defendants.

The trial judge gave judgment for the plaintiff under Lord Campbell's Act for 1589*l.* 8*s.* 6*d.*, and 10*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934. He also assessed the damages to which the plaintiff would be entitled as administratrix of her deceased husband under the Act of 1934 in respect of the loss of expectation of life at 500*l.*

The defendants appealed.

Croom-Johnson K.C. and *Scholefield Allen* for the defendants, appellants. The learned trial judge was wrong in holding that the death of the defendants' deceased driver Radcliffe was due to their negligence, and that they were, therefore, liable under either the Fatal Accidents Acts or the Law Reform (Miscellaneous Provisions) Act, 1934, to pay damages to the plaintiff.

The defendants raised two defences: (1.) that the accident was due to the negligence of the deceased; and (2.) that it was due to the negligence of Jones, another servant of the defendants, and that deceased and Jones were fellow-servants engaged in a common employment. The first of these defences is not now available to the defendants, since the judge has found as a fact that the deceased was not negligent. The defendants now rely upon the defence of common employment. The general principle, upon which that particular defence depends, is that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow-servant, whenever he is acting in the discharge of his duty as servant of the common master of both: per Alderson B. in *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (1); and per Erle C.J. in *Tunney* v. *Midland Ry. Co.* (2) The fact that the servant has been injured by the negligence of a fellow-servant raises a presumption of law that he has undertaken the risk of the injury and cannot hold the master liable. It is not an irrebuttable presumption, but it can only be rebutted by proving an agreement to exclude it, either express or implied from the circumstances.

The doctrine of common employment is explained and illustrated by a long series of cases. The first indication of it is apparently to be found in obiter dicta in the case of *Priestley* v. *Fowler*. (3) Not long afterwards it was applied and enforced in the case of *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (4), where it was held that, where the servant of a railway company travelling in a train in discharge of his duty as such was killed through the negligence of other servants of the company in charge of the train, his representative

(1) (1850) 5 Ex. 343, 352.

(2) (1866) L. R. 1 C. P. 291, 296.

(3) (1837) 3 M. & W. 1.

(4) 5 Ex. 343.

could not maintain an action under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), against the company. The doctrine was also applied in *Wigmore* v. *Jay* (1), where a bricklayer in the service of a builder was killed by the breaking of a scaffold negligently erected by other servants of the builder, and it was held that his representative could not sue the master under that Act. The doctrine is also recognized in the other cases hereinafter mentioned.

The doctrine only applies, however, where the master has taken reasonable care to appoint competent fellow-servants, as appears from the cases last cited and also from *Bartonshill Coal Co.* v. *Reid* (2); *Bartonshill Coal Co.* v. *McGuire* (3); and the American case of *Farwell* v. *Boston and Worcester Railroad Corporation* (4). See also *Fanton* v. *Denville.* (5)

In order that the doctrine may apply, the servants must both be engaged on behalf of the master in the same common employment: *Bartonshill Coal Co.* v. *McGuire.* (3) The doctrine is not, however, restricted to the case of servants doing the same or even similar work, but may extend to a case in which they are engaged in works of dissimilar character or independent operations: *Bartonshill Coal Co.* v. *Reid.* (2) Thus, where the plaintiff, a carpenter in the employment of a railway company, was at work on a scaffold close to the railway line, and porters carelessly moved an engine so that it caused the scaffold to fall and injure the plaintiff, it was held that the company were not liable: *Morgan* v. *Vale of Neath Ry. Co.* (6); and where the plaintiff was employed by a railway company to do certain work on their line, and the train in which he was returning home after his day's work, through the negligence of the guard, collided with another train and he was injured, it was held that the plaintiff could not recover against the company: *Tunney* v. *Midland Ry. Co.* (7) The dissimilarity of the work of the employees would seem to be immaterial, so long

(1) (1850) 5 Ex. 354.
(2) (1858) 3 Macq. 266.
(3) (1858) 3 Macq. 300.
(4) (1842) 4 Metcalf 49; 3 Macq. 316.
(5) [1932] 2 K. B. 309.
(6) (1865) L. R. 1 Q. B. 149; Ex. Ch. affirming 5 B. & S. 570.
(7) L. R. 1 C. P. 291.

as they are working towards a common object, in such circumstances that a duty is cast upon them to be careful towards each other. Accordingly, in a case where the defendants were brewers having a wharf on a river where coals were being discharged to be used in their business, the plaintiff being hired to assist in unloading a barge at the wharf, and a servant of the defendants negligently allowed a barrel to slip upon an upraised flap which fell and injured the plaintiff, it was held that the defendants were not liable to compensate the plaintiff: *Charles* v. *Taylor. Walker & Co.* (1); and in a case where a ship was sent to sea with stanchions and rails on board, but not shipped as they ought to have been so as to raise the bulwarks to the proper height, and in consequence of that neglect a seaman fell overboard and was drowned, it was held that his representatives had no claim for damages against the shipowners: *Hedley* v. *Pinkney & Sons Steamship Co.* (2); and where the plaintiff was engaged by the proprietors of a theatre to perform at a pantomime and, as she was passing a place in the theatre where scene shifters were working, something fell upon and injured her, it was held that she could not maintain an action against the proprietors: *Burr* v. *Theatre Royal, Drury Lane, Ld.* (3) See also per Erle C.J. in *Tunney* v. *Midland Ry. Co.* (4) On the other hand the doctrine will not apply where there is mere similarity of work without any common purpose, as in the case of *The Petrel* (5), where a collision occurred between two steamers belonging to the same owners and it was held that the respective masters and crews were not in common employment. The learned trial judge was wrong in thinking that that case applied here.

It is, of course, plainly involved in the doctrine that it does not apply where the injured servant was not at the time of the injury acting in the service of the master: see *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (6); *Tunney* v. *Midland Ry. Co.* (7); and *Alderman* v. *G. W. Ry. Co.* (8)

(1) (1878) 3 C. P. D. 492.
(2) [1894] A. C. 222.
(3) [1907] 1 K. B. 544.
(4) L. R. 1 C. P. 291, 296.
(5) [1893] P. 320.
(6) 5 Ex. 343.
(7) L. R. 1 C. P. 291.
(8) [1937] A. C. 454

Neither has the doctrine any application where the injured person is not a mere servant but is a volunteer in a service in which he has a common interest with the employer of the servant whose negligence caused the accident: *Hayward* v. *Drury Lane Theatre, Ld., and Others* (1); nor where the person whose negligence caused the accident is an agent of the employer acting vicariously for him: *Wilsons and Clyde Coal Co.* v. *English.* (2)

These being the main features of the doctrine of common employment, it is clearly applicable in the circumstances of the present case. It had been arranged that the defendants should supply six motor-coaches to take a large party of people from Liverpool to New Brighton by the same route, and, after discharging their passengers at the latter place, to return to Liverpool, the deceased driver Radcliffe being in charge of one of the coaches and driver Jones being in charge of another of them.

Both the deceased and Jones were drivers in the service of the defendants. At the time of the accident they were both engaged in the same work of motor-coach driving. They and the other drivers were all engaged in carrying out the same general purpose of performing the journey in question by substantially the same route. They had to rely more or less upon each other, and more especially had driver Jones to rely upon the other drivers, as he did not know the way. That being so, they owed a special duty to each other to be careful. It is not suggested that the defendants did not select competent drivers or that Jones was not a capable driver.

In all the circumstances the deceased man Radcliffe and driver Jones were at the time of the accident engaged in a common employment, and the defendants are not therefore liable to pay compensation to the widow of the deceased for his death by reason of the negligence of Jones. The decision in *Fanton* v. *Denville* (3) did not turn on the question of common employment, but on what the duty of the employer was. The reasons for the decision of the Court of Appeal in that case were criticized by the House of Lords in *Wilsons and*

(1) [1917] 2 K. B. 899.
(2) [1938] A. C. 57.
(3) [1932] 2 K. B. 309.

Clyde Coal Co. v. *English.* (1) The case is, however, of no assistance in the decision of the present case.

It does not make any difference whether the act of negligence causing the injury is committed on the master's property or elsewhere. In *The Petrel* (2) the accident did not take place on the master's property because both the vessels which were in collision were at sea, but it was not suggested that that fact made any difference. If the driver of a motor-coach is injured through the negligence of the conductor, the doctrine of common employment applies notwithstanding that the accident took place on the public highway. The rule is that a master is not responsible for negligent injury done by one of his servants to a fellow-servant engaged in a common employment with him. The reason alleged for the exemption of the employer from liability to his own servant being that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him, and that one of those risks is that of harm due to the negligence of his fellow-servants. In order that this rule of exemption from liability should apply three conditions must be fulfilled : (*a*) the servant injured and the servant causing the injury must be servants of the same employer ; (*b*) they must at the time of the accident have been engaged in a common employment ; and (*c*) the work must in fact bring the two servants into the same area of business, or as Blackburn J. stated in *Morgan* v. *Vale of Neath Ry. Co.* (3) : "the employment "must be common in this sense, that the safety of the one "servant must in the ordinary and natural course of things "depend on the care and skill of the others." It was held in *The Petrel* (2) that seamen engaged on different ships belonging to the same owner were not so connected and therefore were not in common employment. That case is distinguishable, and moreover the decision does not bind this Court. It is in conflict with the earlier authorities and ought to be reversed.

W. Gorman K.C. and *Rice-Jones* for the respondent. The doctrine of common employment was first applied in *Priestley*

---

(1) [1938] A. C. 57.
(2) [1893] P. 320.
(3) 5 B. & S. 570, 580.

v. *Fowler* (1), and was definitely formulated in *Hutchinson* v. *York and Newcastle Ry. Co.* (2) A very clear principle emerges from the authorities. The basis of the doctrine of common employment is contractual. When a servant enters into a contract of employment for the consideration of wages the servant impliedly agrees with his employer to run the risks naturally and normally incidental to the employment undertaken by him. The risks contemplated must be a definite part of his employment including the risks arising from the negligence of his fellow-servants. Unless the danger arising from the work of the fellow-servant is naturally and necessarily incidental to the work of the first servant, there is no common employment between the two servants, as was stated by Blackburn J. in *Morgan* v. *Vale of Neath Ry. Co.* (3): "the employment must be common in this sense, that the safety of the "one servant must in the ordinary and natural course of things "depend on the care and skill of the others." If a workman can do his work without as a natural and necessary inference incurring risk from the work of his fellow-servant, there is no common employment. The doctrine does not depend on the work taking place on the employer's premises, but because the juxtaposition of the workman is inherent to the employment. The fact that the two workmen are on the same pay-roll is immaterial. In the present case Radcliffe could do his work without incurring as a natural and necessary consequence of that work any risk from Jones, therefore they were not in common employment. The only obligation both men were under was to return to Liverpool, but there was no obligation for them to proceed by any specified route. The judge was right in holding that these men were proceeding on independent journeys, and there was evidence on which he was entitled to come to that conclusion.

[GREER L.J. All the coaches were ordered to proceed to New Brighton and deliver their passengers and then return to their garage. Why did not that make their drivers in a common employment ?]

---

(1) 3 M. & W. 1.
(2) 5 Ex. 343.
(3) 5 B. & S. 580.

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

The drivers of the coaches were not in a common employment on that day. The coaches were not ordered to keep together. There were at least three different parties using the coaches. The drivers could take what route they pleased. There was nothing to determine how long the coaches should stop at the Cathedral except the desire of the parties. Every one of the coaches had separate vouchers for entry to the Tunnel. There was nothing to determine the route they should follow from Birkenhead to the Mersey Tunnel. The time the coaches should leave New Brighton was not fixed nor the route by which they should return to Birkenhead. In fact the coaches started their return journey at different times. The coaches did not wait for each other, and they took different routes after passing through the Tunnel.

The knowledge of the risk on the part of the servant is implicit in the decision of *Priestley* v. *Fowler.* (1) *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (2) is distinguishable on its facts. In that case Alderson B. said (3): "Though we "have said that a master is not in general responsible to one "servant for an injury occasioned to him by the negligence of "a fellow servant while they are acting in one common service, "yet this must be taken with the qualification that the master "shall have taken due care not to expose his servant to un-"reasonable risks." Those cases were followed in *Wigmore* v. *Jay.* (4) Lord Brougham in *Bartonshill Coal Co.* v. *McGuire* (5) said that "to bring the case within the exemption, there "must be this most material qualification, that the two servants "shall be men in the same common employment, and engaged "in the same common work under that common employment." Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (6) stated the principle as follows: "When several workmen engage to "serve a master in a common work, they know, or ought to "know, the risks to which they are exposing themselves, "including the risks of carelessness, against which their "employer cannot secure them, and they must be supposed to

---

(1) 3 M. & W. 1.
(2) 5 Ex. 343.
(3) Ibid. 353.
(4) 5 Ex. 354.
(5) 3 Macq. 300, 313.
(6) 3 Macq. 266, 295.

"contract with reference to such risks." Lord Chelmsford L.C. in *Bartonshill Coal Co.* v. *McGuire* (1) said: "Where servants ". . . . are engaged in different departments of duty, an injury "committed by one servant upon the other, by carelessness or "negligence in the course of his peculiar work, is not within the "exception, and the master's liability attaches in that case in "the same manner as if the injured servant stood in no such "relation to him." That passage was quoted with approval by Blackburn J. in *Morgan* v. *Vale of Neath Ry. Co.* (2) The judgment of Blackburn J. was approved by the Court of Exchequer Chamber. (3) The rule as to common employment was stated by Shaw C.J. in *Farwell* v. *Boston and Worcester Railroad Corporation* (4), and his reasons have had considerable weight in this country. *Tunney* v. *Midland Ry. Co.* (5) does not assist in the present case, as the only question decided in that case was whether the plaintiff, who had been injured while riding in a train belonging to the company, was at the time of the accident in the employ of the company. Brett L.J. in *Charles* v. *Taylor, Walker & Co.* (6) enunciated the principle as to common employment as follows: "when the two servants "are servants of the same master, and where the service of "each will bring them so far to work in the same place and at "the same time that the negligence of one in what he is doing "as part of the work which he is bound to do may injure the "other whilst doing the work which he is bound to do, the "master is not liable to the one servant for the negligence of "the other." *The Petrel* (7) is the only reported case in which the doctrine of common employment has been considered in the absence of contiguity. In that case two steamships belonging to the same owners came into collision, with the result that one of them sank with her cargo and the personal effects of her master and crew. The Court found that the steamship which did not sink was alone to blame for the collision. It was held that the crew of the steamship which sank were not in common employment with the crew of the steamship which did not sink, and that therefore they were entitled to claim in respect of their lost effects. It had been argued by Mr. Scrutton that the crew of the two steamships were in common employment and that therefore they could not recover. He said (1): "It "is an analogous case to the drivers of two omnibuses belonging "to the General Omnibus Co., where, in the course of their "employment, they will necessarily meet." Sir F. Jeune P. rejected the contention that physical contiguity of the employments constituted a test whether the two workmen were in common employment. He also doubted whether "one "common object" supplied an exact criterion. The only common object in the present case between the drivers and conductors of the various coaches was the earning of money for their employers and getting the coaches back to the garage, but there was no common way in which that object was to be performed, although each driver may have received identically the same instructions to take his coach back to the garage. In order that there may be a common object there must be a community of interest and a common instruction to the servants to work in unison. The arrival of the coaches at a common destination is not sufficient. On the principles laid down in *The Moorcock* (2) it would not be right to infer that the deceased employee agreed to exempt his employers from liability for the risks of accidents arising from collision with other coaches belonging to the employers while on the highway. The doctrine of common employment is based on an implication introduced into the contract between employer and employed: see *Burr* v. *Theatre Royal, Drury Lane*. (3) Lord Wright in *Wilsons and Clyde Coal Co.* v. *English* (4) said that "the rule is explained on the ground that the employee by his "contract of employment agrees with his employer to assume "the risk of his fellow servant's negligence." That shows that in the view of Lord Wright the basis of the doctrine of common employment was contractual.

---

(1) 3 Macq. 307.
(2) 5 B. & S. 581.
(3) L. R. 1 Q. B. 149.
(4) 4 Metcalf, 49; 3 Macq. 316.
(5) L. R. 1 C. P. 291.
(6) 3 C. P. D. 492, 496.
(7) [1893] P. 320; 62 L. J. (P.) 92.

Croom-Johnson K.C. in reply. Scrutton L.J. in *Fanton* v.

(1) 62 L. J. (P.) 93.
(2) (1889) 13 P. D. 157; 14 P. D. 64.
(3) [1907] 1 K. B. 544.
(4) [1938] A. C. 51, 80.

Denville (1), quoting from Salmond on Torts, 7th ed., p. 126 (now 9th ed., p. 167), said: "This presumption that a servant agrees "to take upon himself the risk of his fellow servant's negligence "is, however, not a mere presumption of fact, as in other cases in "which the maxim is applied; it is a presumption of law, which "can be excluded by nothing less than an express agreement "between master and man by which the master foregoes the "benefit of it." On the evidence Jones was following Radcliffe because he had been sent on a journey, the route of which he did not know, and therefore there is no doubt that they were in common employment.

Cur. adv. vult.

1937. Dec. 20. The following judgment written by GREER L.J. was read by SCOTT L.J. In this action the trial judge gave judgment in favour of the plaintiff under Lord Campbell's Act for 1589*l.* 8*s.* 6*d.* with costs, and assessed the damages to which she would be entitled as administratrix of her deceased husband by reason of the Law Reform (Miscellaneous Provisions) Act, 1934, at 500*l.* No question arises in this appeal with reference to the 500*l.*, as it is now admitted in consequence of the decision of the House of Lords in *Rose* v. *Ford* (2) that the plaintiff would be entitled to succeed in respect of the sum so assessed by the learned judge if she succeeds in her appeal on the point as to common employment.

The question involved in the appeal is whether the negligence of the defendants' driver, which resulted in the death of the plaintiff's husband, E. C. Radcliffe, was the negligence of a servant in common employment with the deceased within the doctrine of law which protects a master from being liable to his servants for the negligence of those in common employment. In order to determine this question it is necessary to state with precision the facts which were proved at the trial.

In the month of May, 1936, the Copmanthorpe Women's Association, the Copmanthorpe Church School, and another Association at Copmanthorpe, applied to Messrs. Dean & Dawson,

(1) [1932] 2 K. B. 325.

(2) [1937] A. C. 826.

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Greer L.J.

the well known firm of travel agents, to supply them with coaches to carry their respective parties from Reece's Café, Parker Street, to the Liverpool Cathedral, and after they had seen the Cathedral to New Brighton, where they wished to be discharged from the coaches; they did not require to be brought back again to Liverpool. In pursuance of those instructions Messrs. Dean & Dawson applied to the defendant company, who run coaches from their garage in Hawthorne Road, Bootle, to various destinations, and also supply coaches on hire, when asked, for a quotation for the necessary coaches. The defendant company replied by sending, as follows, three quotations relating severally to the requirements of each Association:—

"PRIVATE HIRE QUOTATION, No. 8180.

"Dear Sir/Madam

"In reply to your enquiry we beg to quote as follows "(subject to the conditions overleaf) for one coach to seat "31 from Reece's Café, Parker Street, time 1.40 to Cathedral "and New Brighton in Sun Saloon coaches on Thursday "June 25/36 via Direct to Cathedral ½ hour thence to New "Brighton via Tunnel Seacombe and Egremont via No return.

"Passengers 31 Net price including Tunnel Fees £2 14 3
"Less 10% 4 5
"£2 9 10

"Tunnel fees
"are 14/2.

"Yours faithfully,
"p.p. Ribble Motor Services, Ltd.,
"CHARLES.

"Thursday 25th June, 1936."

"PRIVATE HIRE QUOTATION, No. 8179.

"Dear Sir/Madam,

"In reply to your enquiry we beg to quote as follows "(subject to the conditions overleaf) for one coach to seat 32 "from Reece's Café Parker St. time 1.40 P.M. to Cathedral "and New Brighton on Sun Saloon coaches on Thursday "June 25/36 via Direct to Cathedral ½ hour stay thence

C. A.
1937
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.
Greer L.J.

"direct to New Brighton via Tunnel Seacombe and Egremont.
"No return journey.
"Passengers 32 Net price including Tunnel Fees £2 14 3
"Less 10% on £2 3 11 4 5
"£2 9 10
"Booked
"C.S.
"Tunnel fees
" are 14/2.
"Thursday 25th June, 1936."

" Yours faithfully,
" p.p. Ribble Motor Services, Ltd.,
"CHARLES.

"PRIVATE HIRE QUOTATION, NO. 7420.

"Dear Sir/Madam,

"In reply to your enquiry we beg to quote as follows "(subject to the conditions overleaf) for Four coaches to seat "124 from Reece's Café Parker St. time 1.40 P.M. to "Cathedral (on latest Sun Saloons) Mersey Tunnel New "Brighton on Thursday June 25/36 via Mersey Tunnel "Egremont. No return journey.

"Passengers 124 Net price including Tunnel fees £10 17 0
"Less 10% 15 7
"£10 1 5
"Tunnel fees
"are
"3.0.8.
"Thursday 25th June, 1936."

" Yours faithfully,
" p.p. Ribble Motor Services, Ltd.

It will be observed that the agreement concluded with regard to each and every one of the coaches ordered was that they were to start at 1.40 P.M. from Reece's Café to the Cathedral. Before the coaches started from the defendants' garage, each of the drivers was instructed to start from Reece's Café on the journey to the Cathedral and thence to New Brighton. The coaches arrived in sufficient time to pick up the three parties of excursionists at Reece's Café. They arrived considerably before 1.40 P.M. and waited until that time. They then started off together at the same time and went to the Cathedral, and after waiting until each of the three sets of excursionists were ready to resume their places in the coaches they took them through the Mersey

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Greer L.J.

Tunnel to Birkenhead, and from the exit of the Tunnel in Birkenhead via Seacombe and Egremont to New Brighton, where they discharged their passengers. The drivers' instructions as to the return journey were to return direct to the garage, though this was not upon their written instructions. The contract between Messrs. Dean & Dawson and the defendants for the hire of the coaches ceased when the passengers were discharged at New Brighton, therefore the question of agency does not arise for determination.

The question we have to determine is whether the defendants' driver Jones was, at the time he negligently caused the death of the deceased man Radcliffe, in common employment with the deceased man. The written instructions to Jones were as follows:—

"OUTWARD JOURNEY:
"Driver on duty . . 12.55 P.M. Garage (depart) 1.10 P.M.
"Picking up point . Reece's Café, Parker Street. Time 1.40 P.M.
"Destination . . . New Brighton.
"Route . . . . Cathedral (direct) Mersey Tunnel, Egremont.
"RETURN JOURNEY:
"Destination . . .
"Route . . . . No return journey."

The written instructions to the deceased man were as follows:—

"OUTWARD JOURNEY:
"Driver on duty . . 1.0 P.M. Garage (depart) 1.15 P.M.
"Picking up point . Reece's Café, Parker Street. Time 1.40 P.M.
"Destination . . . New Brighton.
"Route . . . . Cathedral (½ hour stay). Tunnel. Seacombe. Egremont.
"RETURN JOURNEY:
"No return journey."

It seems to me that on the vital question the instructions with regard to the return journey so far as they were in writing were the same in both cases, but it was proved and not contradicted that oral instructions were given by the man in charge of the garage to all the drivers of the six coaches that after leaving New Brighton they were to go back direct to the garage. Notwithstanding the difference in time suggested by the written instructions with regard to the outward journey, it was proved that all the coaches went together from the garage to Reece's Café, waited there together until 1.40 P.M., went together to the Cathedral as a team, and started from there at the same time and went together as a team to New Brighton; but I do not think the instructions as to the outward journey are relevant to the consideration of what Jones and the deceased man were doing on the journey back to the garage. All the coaches came back from New Brighton the same way to the entrance to the Tunnel at Birkenhead. They came back as a team as they had gone as a team, but there was some disorganization, first at the entrance to the Tunnel at Birkenhead, and secondly in the course of going through the Tunnel some of them were delayed at the turn in the Tunnel where there are traffic lights. When the coach driven by the deceased man and those driven by Jones and another man called Cartmel emerged from the Tunnel, the deceased man proceeded to take his coach by a route which, beginning at William Brown Street, would have taken him through Islington to Christian Street, and then by Cazneau Street and Stanley Road to the garage in Hawthorne Road, Bootle. Jones followed him intending to go by the same route, and Cartmel followed Jones. The route so taken by the three coaches was certainly not the nearest way to the garage, as the learned judge found on looking at the map; but the drivers of all three coaches that went by William Brown Street were doing so in what they conceived to be the right way to carry out their instructions to go direct to the garage. After the deceased man had driven his coach as far as the steps of the Museum in William Brown Street, his coach stopped, and he got out of it to see what was wrong. Jones, who was then behind him, endeavoured to get in front of him with the idea of stopping and seeing what was wrong, and, I think, in order to see whether he could assist in correcting anything that happened to be wrong. Jones did not see Radcliffe, who was standing on the off-side of his coach, and unfortunately

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Greer L.J.

Radcliffe was crushed and received injuries from which he died. The trial judge found that Jones was guilty of negligence, and this is not now disputed. It was admitted that on the homeward journey each driver could go any way that he chose. It was stated by Mr. Parsons, who was in charge of the garage, that it was customary for anybody on a common errand to stop when a driver had broken down, and inquire what was wrong.

The above seem to me to be the facts proved at the trial relevant to the question whether the deceased man and Jones were in common employment, within the meaning of the cases, at the time the deceased received his fatal injuries, which, as is not disputed, were occasioned by the negligence of Jones. In my judgment, the weight of authority is in favour of the view that the two men were, at the time when the deceased was fatally injured, in common employment within the meaning of the doctrine of common employment as applied in the decided cases. All the cases which have touched on the question of common employment, beginning with *Priestley* v. *Fowler* (1) down to *Fanton* v. *Denville* (2), were cited in the argument. I do not propose to examine all these cases in detail, but to state, in my opinion, what propositions of law can be gathered from the cases cited.

I think it is established (1.) that in every contract of service there is implied by law a promise by every employee that he accepts the risk of injury by the negligence of his fellow employees engaged in common employment with him. In *Morgan* v. *Vale of Neath Ry. Co.* (3) Blackburn J. says: "That principle I take to be that a servant who engages for "the performance of services for compensation, does, as an "implied part of the contract, take upon himself, as between "himself and his master, the natural risks and perils incident "to the performance of such services; the presumption of law "being that the compensation was adjusted accordingly." In giving his judgment in *Bartonshill Coal Co.* v. *Reid* (4) Lord Cranworth said: "The law of England considers that the person

(1) 3 M. & W. 1.
(2) [1932] 2 K. B. 309.
(3) 5 B. & S. 570, 578.
(4) 3 Macq. 266, 277.

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Greer L.J.

"who undertakes the service undertakes it knowing that he is "liable to injury as well from accidents that cannot be guarded "against, as from neglect or mismanagement on the part of "those who are engaged with him in the common occupation." In the judgment of Chief Justice Shaw in the American case of *Farwell* v. *Boston and Worcester Railroad Corporation* (1), which is referred to with approval in the judgment of the House of Lords in *Bartonshill Coal Co.* v. *Reid* (2), the rule is stated as follows: "The general rule, resulting from con-"siderations as well of justice as of policy, is, that he who "engages in the employment of another for the performance "of specified duties and services for compensation takes upon "himself the natural risks and perils incident to the per-"formance of such services, and in legal presumption the "compensation is adjusted accordingly." I think we are bound to hold that the undertaking by an employee with reference to the risks of common employment arises from an implication imposed by law in every case of employment where there are no circumstances which indicate a contrary intention.

(2.) In the next place, I think it is well established that it is not sufficient merely to show that the negligent employee and the one who is claiming damages based on that negligence are servants of a common master. Lord Brougham said in giving judgment in *Bartonshill Coal Co.* v. *McGuire* (3): "To "bring the case within the exemption, there must be this most "material qualification, that the two servants shall be men "in the same common employment, and engaged in the same "common work under that common employment." There are several cases which establish that two men may be in common employment within the doctrine relating to common employment even though they are working in different departments of duty. For example, it was held in *Bartonshill Coal Co.* v. *Reid* (4) that, where a collier was injured by the negligence of the engineer working the cage, the two men were in common employment at the time when the injuries were inflicted on the

---

(1) 4 Metcalf, 49; 3 Macq. 316, 317.

(2) 3 Macq. 297.

(3) 3 Macq. 300, 313.

(4) 3 Macq. 266.

C. A.
1937

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Greer L.J.

collier, the husband of the pursuer. In *Morgan* v. *Vale of Neath Ry. Co.* (1) it was held that a carpenter standing upon a scaffold engaged in work on the roof of an engine shed was in common employment with certain porters whose duty it was to operate turn-tables on the ground floor. In *Tunney* v. *Midland Ry. Co.* (2) it was held that the plaintiff in the action, who was in the course of his duty travelling home in one of the defendants' trains, was in common employment with the driver of the engine which was drawing the train in which he was, and also with the driver of another engine with which it collided. There is no case in which it has ever been held that two employees together carrying out the same order of their employer, are not in common employment. In my view the present case is an a fortiori case to *Morgan* v. *Vale of Neath Ry. Co.* (1) and *Tunney* v. *Midland Ry. Co.* (2) In my judgment it is not the law that two employees carrying out similar orders in close juxtaposition to one another, are not engaged in a common employment. To me it seems quite clear that at the time of the accident Jones and the deceased man Radcliffe were not only in the employ of the same master, but were engaged in the same common work.

I have considered the case of *The Petrel* (3). It is not necessary to determine whether the decision of Sir Francis Jeune P. was or was not right. The facts of that case were entirely different from those in the present case. I think the two men in the present case were engaged in common work within the meaning of the decisions of the Court, because, as I have said, they were engaged in carrying out together the order of their employer to get back direct to the garage, and because Jones was in fact doing what he was expected to do by his employer, that is to say, trying to get in front of the deceased's coach and then pull up and go to his assistance. The learned judge (Hawke J.) rightly says in his judgment at p. 3 of the transcript: "I was quite clear that the mere fact "that two men serve one master does not necessarily bring "them within the doctrine. I think that they must have not

(1) 5 B. & S. 570.
(2) L. R. 1 C. P. 291.
(3) [1893] P. 320; 62 L. J. (P.) 92.

"merely a common master but have been engaged in a "common employment." After referring to *The Petrel* (1) he is reported as saying this : " I think that case also establishes "the fact that just as it is not sufficient to bring it within the "doctrine to prove the two men are making money for the "same master, equally it is not necessary to prove that the work "that they were doing was of a similar or even identical "character." This is accurate, but of course it must be understood in relation to the facts of any particular case, and I should think it would be right to say that it could not be disputed that if two men were doing together similar or identical work, they would be regarded in law as being within the doctrine of common employment.

In my judgment Jones and the deceased man Radcliffe were not only in the service of a common employer at the time Radcliffe received his injuries, but were engaged in a common work, and they are therefore brought within the exception to liability which has been established by the doctrine of common employment. For these reasons I think we must allow this appeal with costs.

SCOTT L.J. I concur.

LUXMOORE J. I agree.

Appeal allowed.

Solicitors for appellants: *Berrymans, for Weightman, Pedder & Co., Liverpool.*

Solicitors for respondent: *Silverman, Jordan & Co., for Silverman & Livermore, Liverpool.*

R. F. S.

---

(1) [1893] P. 320; 62 L. J. (P.) 92.

C. A.
1938
April 8.

THE KING *v.* THE BOARD OF CONTROL.

Ex parte WINTERFLOOD.

Local government—Mental defective—Order placing defective under guardianship—Expiration of order—Continuance order not sealed till after date of expiration of original order—Validity—Habeas corpus—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 11, *sub-ss.* 1, 2.

By s. 11, sub-s. 1, of the Mental Deficiency Act, 1913: "An order "made under this Act that a defective be sent to an institution "or placed under guardianship shall expire at the end of one year "from its date, unless continued in manner hereinafter provided." A proviso follows under which the next succeeding quarter-day may be substituted for the anniversary as the date on which the order shall expire. Sub-s. 2: "An order shall remain in force "for a year after the date when under the preceding provisions "of this section it would have expired, and thereafter for successive "periods of five years, if at that date and at the end of each period "of one and five years respectively the Board, after considering "[certain special reports and other matters] consider that the "continuance of the order is required in his interests and make an "order for the purpose."

On June 11, 1929, an order under the Act was made in respect of the applicant, expiring on June 24, 1930. On June 23, 1930, a continuance order was made expiring on June 24, 1931. Further purported continuance orders were made on June 29, 1931 (expiring June 24, 1936), and on July 6, 1936. With regard to the order dated June 29, 1931, the special report and certificate of the medical officer were referred back to the medical officer by a Commissioner on June 23, 1931, for amendment. They were returned on July 4, 1931, and were submitted to another Commissioner, who directed their acceptance on July 7, 1931. On an application for habeas corpus on the ground that the order of July 6, 1936, was invalid (*a*) as being made out of time and (*b*) as purporting to continue the order of 1931, which was itself invalid because it was made out of time, the Divisional Court held that, though the intention of the Legislature was quite clearly that there should be no gaps, the Act must not be construed with unreasonable strictness, and, as the statutory consideration of the reports had taken place at the proper time, the actual sealing of the order might, in the absence of mala fides, take place within a reasonable time thereafter:—

Held, by the Court of Appeal, that the continuation order dated June 29, 1931, was invalid, as it was not made until after the expiration of the previous order on June 24, 1931, and further that the continuation order of June 29, 1931, was on its face a nullity, because it contained a statement that the Board of Control having considered the requisite reports and certificates and the means of care and supervision were satisfied that the continuance of the order of June 23, 1930, was required, whereas the satisfaction of the Commissioner was not in fact arrived at until July 7, 1931. As the order of June 29, 1931, was ineffective, its purported continuance by the order of July 6, 1936, was equally ineffective and the man was therefore not being validly detained, and the rule for habeas corpus must be made absolute.

Decision of Divisional Court [1938] 1 K. B. 420 reversed.

APPEAL from a decision of the Divisional Court upon a rule nisi for habeas corpus. (1)

On June 11, 1929, an order was made by the competent judicial authority under the Mental Deficiency Act, 1913 (2), certifying that Horace Edward Winterflood was a mental defective within the meaning of the Act, and should be sent to an institution, and he was sent to a farm colony at Hildenborough, Kent.

The Board of Control directed that the order should, unless continued, expire on the quarter-day next after the day on which it would have expired but for that direction, i.e., on June 24, 1930. The order was duly continued by an order dated June 23, 1930, based upon a special report dated June 3, 1930, and a certificate dated June 5, 1930.

---

(1) [1938] 1 K. B. 420.

(2) The Mental Deficiency Act, 1913, s. 11, sub-s. 1: "An order "made under this Act that a "defective be sent to an institution "or placed under guardianship "shall expire at the end of one "year from its date, unless con-"tinued in manner hereinafter "provided:

"Provided that in the case of "any institution the Board may "by order direct that orders that "persons be sent thereto shall, "unless continued as hereinafter "provided, expire on the quarter "day next after the day on which "the orders would have expired "under the above provision."

Sub-s. 2: "An order shall "remain in force for a year after "the date when under the preced-"ing provisions of this section it "would have expired, and there-"after for successive periods of "five years, if at that date and at "the end of each period of one and "five years respectively the Board, "after considering such special "reports and certificate as is here-"inafter mentioned and the report "of any duly qualified medical "practitioner who, at the request "of the defective or his parent or "guardian or any relative or "friend, has made a medical "examination of the defective and "the means of care and supervi-"sion which would be available if "the defective were discharged "consider that the continuance of "the order is required in his "interests and make an order for "the purpose."

This order, which expired on June 24, 1931, was purported to be continued by a further order dated June 29, 1931, based upon a special report dated June 2, 1931, and a certificate dated May 19, 1931, for five years expiring on June 24, 1936.

It appeared from the affidavits filed on behalf of the Board of Control that on June 24, 1931, the special report and certificate of the medical officer under s. 11, sub-s. 4 (*b*), were by the direction of the Hon. H. C. Bailey, a Commissioner, given on June 23, 1931, referred back to the medical officer for amendment, and that in their amended form they reached the Board on July 4, 1931. The special report and certificate as amended were re-submitted to another Commissioner, Surgeon Rear-Admiral J. F. Hall, who on July 7, 1931, directed their acceptance.

The sealed order was despatched to the institution on July 27, 1931.

On July 6, 1936, a further continuance order, based on a special report and certificate both dated May 26, 1936, purported to continue the order for a further period of five years from June 24, 1936.

During the intervening period Winterflood had resided partly at the farm colony at Hildenborough, and partly, under licence, with his own relatives. In April, 1936, owing to some trouble which arose, he was taken to an institution at Forest Gate, and thence to Hildenborough again. After some intermediate residence on licence with certain persons at Southall a home was found for him with a Mrs. Mordey, who was originally made a respondent to the rule.

The rule was obtained on the ground that the continuance order of 1936 was bad in that it purported to continue on July 6, 1936, an order which had expired on June 24, 1936, and also in that it purported to continue an order which was itself invalid for a like reason, having been made on June 29, 1931, when the order which it purported to continue had already expired on June 24, 1931.

The Divisional Court discharged the rule nisi for habeas corpus, holding that, though the intention of the Legislature was that there should be no gaps, the Act must not be construed with unreasonable strictness, and, since the statutory consideration of the reports had taken place at the proper time, the actual sealing of the order might, in the absence of mala fides, take place within a reasonable time thereafter.

Winterflood appealed.

W. A. L. Raeburn for the appellant. The decision of the Divisional Court was wrong. An order made under the Mental Deficiency Act, 1913, expires automatically at or before the date of expiration, unless it is continued before that date. Sect. 11, sub-s. 1, of the Act of 1913 expressly provides that an order that a defective be sent to an institution or placed under guardianship shall expire at the end of one year from its date unless continued, and sub-s. 2 provides that an order shall remain in force for a year after the date when it would have expired and thereafter for successive periods of five years if at that date and at the end of each period of one and five years the Board consider that the continuance of the order is necessary in the interests of the defective and make an order for that purpose. As the continuation order was not made until June 29, 1931, whereas the previous order expired on June 24, there was no authority by which the man was detained after June 24, 1931. A continuance order made subsequently could not operate retrospectively to the expiration of the previous order. The words "at the end "of each period" cover not only the consideration of the special reports and certificate but also the making of the continuance order. The words must mean that the continuance order was made before the expiration of the period for which the previous order was made.

[GODDARD J. There is a great difference between an order made by a judge, which operates at once before it is drawn up, and an order of the Board of Control which sits in secret and no one knows what their decisions are except by their formal orders duly sealed.]

[SLESSER L.J. A British subject is entitled to his liberty unless authority can be shown for his detention.]

Secondly, the continuance order which is dated June 29, 1931, was a nullity because it was made before the statutory conditions had been fulfilled. The Board, acting through one of its Commissioners, before making a continuance order must consider the special report and certificate of a duly qualified medical practitioner. In the present case the Commissioner was not satisfied with the special report and certificate and sent them back to be amended, and they were not considered and accepted by another Commissioner until July 7. As the continuance order of June 29, 1931, was not validly made, it could not validly be continued by the order of July 6, 1936, and further that order was itself invalid because it was not made within the period of five years from the date of the previous order. The rule for habeas corpus ought therefore to be made absolute.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the Board of Control. The construction which the Board of Control and the Divisional Court have placed upon s. 11 of the Mental Deficiency Act, 1913, is the correct one. The words of the section have to be considered in relation to the context in which they appear and to the intention of the Legislature as embodied in them.

[SLESSER L.J. If there is no ambiguity in the language of the section, one cannot consider the context: see Craies on Statute Law, 4th ed., p. 87.]

The words "at the end of each period" are ambiguous, as they may have more than one meaning. It is not unimportant to remember that the same word is used to cover two activities, namely the consideration by the Board of the special reports and certificate of the visitors and the duly qualified medical practitioner and also the making of the order.

[SLESSER L.J. The word "consider" is used twice; on the second occasion it must mean "are satisfied."]

The statute in using the second "consider" is charging the Board to consider in the light of their experience the special reports and certificate. There are two processes which the Board have to carry out, the consideration of the special reports and certificate and the making of the order; both of these processes take up time. The affixing of the Board's seal to an order is a different process from the second considering. The second "consider" at the end of sub-s. 2 of s. 11 refers to the Board's consideration of the case after seeing the special reports and certificate. That consideration must, in the interests of the defective himself, take place either on the quarter-day or as near as possible to June 24. If the consideration had taken place ten days previous to that date it might be said that the order was invalid on that ground.

[Goddard J. What is the legal warrant for detaining the man after June 24?]

The Board may make an order subsequent to June 24 which will nevertheless have effect from June 24. The consideration by the Board of the special reports and certificate would in a normal case take place by the quarter-day, but in difficult cases the consideration is sometimes delayed. The language of the Act is ambiguous. The argument on behalf of the Board is not based upon convenience in the ordinary sense, but the Legislature has ordered two separate duties to be performed at the same time. The duty of the Board is to start at a reasonable time before the end of the period for which the defective is detained to obtain the necessary documents relating to him, but they would commit a breach of their duty if they considered those documents before the end of the period. The Board are entitled to a reasonable time after the quarter-day within which to affix their seal to the order, but the order when completed has a legal effect from the quarter-day. The Board could make a continuance order within the period if there was nothing to raise a doubt, as there was in the present case.

[Goddard J. Your argument in effect is that the order for the man's detention shall remain in force unless it is discharged, but the order for detention is to expire at the end of the prescribed period unless it is continued. Unless there is a continuance order, the man's detention after the expiration of the period for which he was ordered to be detained cannot be justified.]

It is a frequent incidence of the administration of justice that the drawing up of an order for a man's detention is delayed, but nevertheless the man is detained and his detention cannot be questioned.

[Clauson L.J. The order of June 29, 1931, as drawn up is not correct. The Board did not decide that the special report and certificate of the medical officer in their amended form should be accepted until July 7, 1931; therefore they did not conclude their consideration until that latter date.]

The proper inference to be drawn from the documents is that Mr. Bailey was satisfied in his own mind on June 23, 1931, that the order ought to be continued, but that he sent the documents back for certain amendments to be made in them. If the Board had made up their mind on the quarter-day that it was desirable that a continuance order should be made, the detention of the defective after the quarter-day was legal, and the continuance order need only be drawn up within a reasonable time of the quarter-day, and it then related back to the end of the previous period of detention.

Slesser L.J. On July 27, 1937, a rule nisi was granted by the Divisional Court calling upon certain persons, namely, Rhoda Mordey and the Mayor, Aldermen and Burgesses of the County Borough of East Ham, and also the Board of Control, to show cause why a writ of habeas corpus should not issue directed to them to have the body of Horace Edward Winterflood immediately before this Court to receive such things as this Court should then and there consider of and concerning him in this behalf. That rule nisi came before the Divisional Court for consideration on the application to be made absolute on October 27, 1937, when the Divisional Court discharged the rule. (1) We are not now concerned with the matter so far as it concerns the Corporation of East Ham or the lady; this appeal is brought solely against the Board of Control by Winterflood, saying that in all the circumstances of the case the Divisional Court was wrong in its determination.

(1) [1938] 1 K. B. 420.

The facts of the case may shortly be stated thus: On June 11, 1929, an order was made under the provisions of the Mental Deficiency Act, 1913, by a competent judicial authority that Winterflood, then being a defective, should be sent to an appropriate institution referred to in the Act. That order was made in accordance with that Act, which requires in the first instance that the order be made by the competent judicial authority. In 1930 Winterflood, having been sent to a farm at Hildenborough appropriate for his detention, was temporarily released on licence to live with his parents, and later returned for further detention, but on June 23, 1930, a continuation of the detention order was made. Up to that time no question arises but that the orders that had been made in this case were properly made, and continuation of the detention had duly been authorized in June, 1930, to expire, as I read the statute, on June 24, 1931. Sect. 11 of the Mental Deficiency Act, 1913, provides in sub-s. 1 that "An order made under this Act that a defective be sent to an "institution or placed under guardianship shall expire at the "end of one year from its date, unless continued in manner "hereinafter provided: Provided that in the case of any "institution the Board may by order direct that orders that "persons be sent thereto shall, unless continued as hereinafter "provided, expire on the quarter day next after the day on "which the orders would have expired under the above "provision." In this case the first impeached continuance order is dated June 29, 1931, and it is contended that, in so far as the order which the Board of Control had made in 1930 was dated June 23, 1930, expiring on June 24, 1931, that valid order had expired and ceased to have any effect, and therefore could not be continued at the time when the order of June 29, 1931, for a period of five years, was made under sub-s. 2 of s. 11, and that, therefore, on and after June 24, 1931, the Board of Control were unable in law to show any cause for detaining this man in their custody. It is upon that failure to make the order within a year of June 24, 1930, that this application for habeas corpus is brought. After 1931 this man continued to be detained under the 1931 order for the statutory period, in accordance with the provisions of sub-s. 2 of s. 11, which provides that "An order shall remain in "force . . . . thereafter for successive periods of five years, "if at that date and at the end of each period of one and "five years respectively the Board, after considering such "special reports and certificate as is hereinafter mentioned "and the report of any duly qualified medical practitioner "who, at the request of the defective or his parent or guardian "or any relative or friend, has made a medical examination "of the defective and the means of care and supervision "which would be available if the defective were discharged "consider that the continuance of the order is required in his "interests and make an order for the purpose." It is not disputed here by the learned Attorney-General that if in fact the order which had been made on June 23, 1930, had expired before June 29, 1931, and if consequently there was, in that interval between June 24, 1931, and June 29, 1931, an improper detention, the extension of five years after June 29, 1931, or any further extension, must also be indefensible, because it would not be made under a valid order. Therefore, the question primarily here to be considered is whether on June 29, 1931, it can be said that the order then made and sealed by the Board of Control had such an effect that it legalized the detention after June 24, 1931.

In my opinion, having regard to the provisions of the statute, it is not possible to say that the order made on June 29, 1931, was competent at that time to operate upon this man, whose period for detention had expired on June 24, 1930. The reason why I have come to that conclusion is this: s. 11 of the Mental Deficiency Act, 1913, seems to me to be unambiguous in its terms. I do not think that the language is such as to permit any consideration of the conveniences or inconveniences which may be felt in operating the Act by the Board of Control. It is only where the language is ambiguous that it is admissible to consider what may be the consequence of giving to it a meaning which is inconvenient. The argument ab inconvenienti is only admissible in construction where the meaning of the statute is obscure. Where the language is explicit, its consequences are for Parliament, and not for the Courts to consider. In such a case, it has been said, that appeal for relief must be made to the law-giver, and not to the lawyer. The learned judges in the Divisional Court in this case have referred to the language of s. 11 as vague, but I can find no vagueness in its provisions. Under s. 10, sub-s. 1, it is provided that a defective may be sent to an institution, and after providing other matters it goes on: "his detention in that institution for such period as is hereinafter mentioned" is legalized. Now, the "period hereinafter mentioned" is contained in s. 11. The first provision of sub-s. 1—I have already read it—is to the effect that the order made by the judicial authority under the Act that a defective be sent to an institution "shall expire at the end of "one year from its date, unless continued in manner hereinafter provided." The only extension to that year is contained in the proviso to the effect that where it is a case of the inmate of an institution "the Board may by order direct "that orders that persons be sent thereto shall . . . . expire on "the quarter day next after the day on which the orders would "have expired under the above provision"; so that the necessary termination of the judicial order must take place at the latest on the expiration of the quarter-day next after the day on which the orders would have expired apart from the above provision. Applying that provision to this case the Board of Control duly directed that the judicial order should expire on June 24, 1930. Then, acting under the provisions of sub-s. 2, a continuance order was made by the Board on June 23 under the words of the ensuing sub-s. 2 to the effect that "An order shall "remain in force for a year after the date when under the "preceding provisions of this section it would have expired, "and thereafter for successive periods of five years." The right time when a further order for the successive period of five years ought to have been made was, therefore, on June 24, 1931, when the order made on June 23, 1930, expired. There can be no question, I think, as Humphreys J. indicates in his judgment in the Divisional

Court, that the date at which the order is made must be taken to be the date when that order is sealed. Statutory forms have been devised under this Act, and the form in question, Form D.3, recites that after the Board have considered the requisite reports, and so on, and are satisfied that the continuance of the order is required in the interests of the detained person, "hereby order the same to be "continued for one or five years," there follows "The "Common Seal of the Board of Control was hereunto "affixed this day in the presence of (blank)." As the Act provides that the Board of Control shall be a Corporation and have a Seal, I cannot see any other way in which the order could be promulgated except under their Seal, nor is it seriously suggested that it could be done in any other way.

It follows, therefore, that we have here a case where for five or six days it would have been possible for this detained person lawfully to walk out of the institution in which he was detained, and nobody could point to any authority under which they could properly detain him, and in considering, now that he has been further detained, whether he has not the same right to demand a rule of habeas corpus, I think the same considerations must apply. The learned Attorney-General has argued that this view is not a correct one, because he says that the Act contemplates in sub-s. 2 of s. 11 that the Board will give consideration to certain matters, and that if they come to their final consideration, after taking those matters into account, that the continuance of the order is required, it assumes that thereafter they may make an order within a reasonable time from their final consideration. I do not so read the section. The drafting is unfortunate in this sense, that the word "consider" is used twice in the section. The Board first of all are to consider various special reports, certificates, and the like. That can clearly be done during the period of one or five years, because the provision is that, after considering such reports, certain acts are to be done. It goes on to say that the order shall remain in force for a further period if, after considering those reports, the Board "consider that the "continuance of the order is required" in the interests of the detained person and make an order for that purpose. I think that word " consider " there means " are satisfied," and that is exactly the view which is taken in the form itself ; not that it is legitimate to construe the meaning of an Act by reason of a form made under the Act, but I mention it because it so exactly agrees with my view of the construction of the Act. There the phrase is : " The Board of Control, having considered "the requisite matters and being satisfied that the continuance of "the above-mentioned order is required, make the order." Now, in my view, that is no more than saying in the section that it is a condition precedent to the making of a valid order that the Board should be, at the time of so making the order, satisfied, after considering the various matters set out in the section, that an order ought to be made ; that is, they must satisfy themselves and declare that the continuance of the order is required in the interests of the detained person. All those considerations may take place before the order is made, but the making of the order and the satisfaction on the consideration of all the matters that the continuance of the order is necessary appear to me to be one and the same act, the satisfaction as to the matters which they have to consider being a condition under which the order can be made.

Therefore, in this case, for the reasons which I have stated, I think it is impossible to say that this man was validly detained, because no order was made in 1931 within the period required by s. 11, sub-s. 2, of the Act. But, having said that, I must point out that there is a second and further reason for acceding to Mr. Raeburn's argument in this case. In my view, on the evidence which was before the Divisional Court and is disclosed before us on the affidavits, it is not possible on any view to say that this was a valid order. It is, as I have said, a necessary condition of making the order that the competent authority (which may be one Commissioner, as the Act prescribes) considers that the continuance of the order is required in the interests of the detained person. The facts of the case go to show this : that, so far from that requirement being satisfied, this order being dated June 29, 1931, it was not until July 7, 1931, that the Commissioner who had to satisfy himself of the requirements of the section came to his final conclusion. I do not think it necessary now to go into the details of this matter, but the fact is, as appears from the affidavits, that a report and certificate having been received from the visitors on June 11, 1931, by the Board of Control, and a special report and certificate on May 30, 1931, they did not satisfy the Hon. H. C. Bailey, who was then one of the Board's Commissioners, and he sent them back again with this instruction : " First return Special Report "and Certificate for Class and facts in support ; also for "reinstatement of the words ' in an institution.' " The order had come to him with the statement that this man was not in an institution, which was in fact inaccurate, but stating that he was under guardianship. The matter was therefore sent back for reconsideration, and was so reconsidered, apparently, on July 4, when fuller details were sent to the Commissioner under the signature of Mr. Malcolm Barker, the Deputy Medical Officer, giving information about the mental deficiency of this person, saying that he exhibited irritability but was amenable to discipline, and that he had certain other deficiencies, some of which may be shared by others, such as the inability to do simple sums, and others of a more serious nature ; but in any event, that matter went back again to another Commissioner, Surgeon-Rear-Admiral Hall, and it was not until July 7 that he directed its acceptance. It follows, therefore, that the statement which appears in the challenged order of June 29, 1931, to the effect that the Board of Control, having considered the requisite reports and certificates and the means of care and supervision, were satisfied that the continuance of the above mentioned order was required, was not the fact : they were not so satisfied through their competent Commissioner until July 7, and for that reason also the order is defective, because it is a condition of making the order that the Commissioners or the competent Commissioner consider that the continuance is required in the defective's interests, and if that word " consider " there means, as I think it must mean, on the consideration preceding it, satisfied, it is falsa demonstratio: in fact, no such satisfaction was arrived at until July 7.

For both these reasons, therefore, both because the order on the face of it is bad and secondly because the order was made too late to comply with s. 11, I am of opinion that there was no right to detain this man in this institution for more than a year after the date when the order had been made in 1930, and consequently that the Divisional Court were wrong in ordering the discharge of the rule, and that this appeal ought to be allowed.

CLAUSON L.J. I agree that this appeal ought to be allowed, and I desire to base my decision upon one point which I can state quite shortly. On June 23, 1931, or possibly on June 24, 1931, an order expired under which the present applicant was being lawfully detained under the Mental Deficiency Act, 1913. That order expired, unless it had been continued in accordance with the provisions of s. 11, sub-s. 2, of the Act of 1913. As evidence of the fact that it was continued, there is produced an order of the Board of Control which purports to be an order sealed on June 29, 1931. I will assume for the moment that the mere fact that that order was dated after the expiration of the order under which the defective was being detained up to June 24, 1931, does not matter, though I wish most carefully to guard myself from its being supposed that I take the view that it does not matter; but on investigating the facts it appears that that order of June 29, 1931, is a nullity, and a nullity for this reason. The Board of Control can exercise its powers through a Commissioner. Now, the matter came before the Commissioner, Mr. Bailey, at a date just anterior to the expiry of the admittedly valid order. He was not prepared to make, on behalf of the Board of Control, a continuation order. He required certain amendments to be made in the certificates placed before him. Nevertheless, on June 29, if credence is to be given to this document, this order was sealed by the Board. It appears from the affidavits that what in fact happened was that another Commissioner, in the absence of Mr. Bailey, investigated the matter, and made up his mind at some date between July 4 and 7, 1931, that it was proper to make a continuation order, and, he having made up his mind, what purported to be an order of June 29 was (if I may use the common expression) released, and is now brought before us as a valid order. It appears to me that it was necessarily an invalid order. In fact, on June 29 neither the Board of Control nor anybody acting under the Board of Control did in fact consider that the continuance of the order was required in the interests of the patient, or that an order ought to be made. Accordingly, in my view, that document is an entire nullity: it had no effect at all.

Now, it is admitted that, if that document was ineffective, the purported continuance of the order by an order of July 6, 1936, would be equally ineffective: it is impossible, of course, to continue an order which has expired, and which has been continued up to the date of the suggested fresh continuance if at all by a document which is a nullity, and accordingly at the date of this application there was no valid order in existence under which this defective could be detained.

For these reasons, it appears to me that the decision of the Divisional Court cannot be supported.

GODDARD J. I agree with my Lords in differing from the Divisional Court, and I will briefly state my reasons. The angle from which the Divisional Court approached this case seems to me to be this: They said that as the statute of 1913, s. 11, sub-s. 2, provides that at the end of each period for which the order is effective the Board, after considering certain reports and certificates which are mentioned in the statute, may make an order, if they see fit, continuing the original order, that they must have an opportunity of considering the matter after the expiration of the period for which the original order was valid; but the difficulty which I see in the way of accepting that view is this: at common law, if one person deprives another of his liberty, or detains him, and if a writ of habeas corpus is sought, or an action for false imprisonment is brought, the person who has detained the other can only avoid the writ or set up a defence to the action for false imprisonment if he can show a legal authority for detaining the person who has been detained. The legal authority need not always be in writing: a police constable who arrests a person suspected of a felony can arrest and detain that person until he can bring him before a magistrate, who will then remand the prisoner either to prison until the case is inquired into or hold him to bail. When a judge has sentenced a prisoner the gaol delivery is sometimes not signed until some weeks afterwards, but the sentence stands from the day on which it is delivered, and the gaoler who is in Court has authority, by the judge pronouncing sentence, to hold the prisoner for the period for which he is sentenced. But in this case, the applicant being under the control or detention of the Board of Control, the Board of Control allege that they are detaining him by virtue of the Mental Deficiency Act, 1913, and they must, therefore, in my judgment, show that they have, at the time when he complains that he was wrongfully detained, a valid and effective order in force. The Act contains provisions as to how orders are to be obtained. The formalities of the Act have to be followed. An order can be obtained either by presentation to a judicial authority in the manner provided in the Act, on which the judicial authority as defined in the Act can make an order, or, as quite frequently happens, a Court exercising criminal jurisdiction, if satisfied that the prisoner who is found guilty or pleads guilty is a mental defective within the meaning of the Act, can make the same order that a judicial authority under the Act may make. That is the only way in which the Mental Deficiency Act, as far as I know, can be set to work. Sect. 10, sub-s. 1, of the Act then provides that " An order that a defective "be sent to an institution shall authorise the conveyance "of that person to and his reception in the institution "mentioned in the order . . . . and his detention in that "institution for such period as is hereinafter mentioned," and the period which is thereinafter mentioned is one year.

C. A.
1938

Rex
v.
The
Board of
Control.
Winterflood,
Ex parte.

Goddard J.

It is provided in s. 11, sub-s. 1, of the Act that "An order "made under this Act that a defective be sent to an institution "or placed under guardianship shall expire at the end of one "year from its date," and then there is the provision "unless "continued in manner hereinafter provided." As, therefore, the Act provides in plain terms that the order shall expire at the end of one year from its date, when one year from the date has elapsed the order is no longer of effect, and the keeper of the institution, or wherever the defective may be, has no warrant in law for detaining him there. If then the Board of Control consider that the defective should be confined in the institution for a longer period, they must, in manner provided in the Act, make a continuation order providing for the continuance of the detention, and that order, it seems to me, must come into effect, and they must make it so that it comes into effect, at the time when the previous order expires. Now, I can see that there may be great administrative difficulties in the way. It may very well be that it would be in the interests of these unfortunate people that some provision should be made for a period after the expiration of the order during which they should be held in what one may call temporary custody while the Board of Control are considering the case. The answer is that the Act does not provide for such a temporary custody, and if that, as a matter of administration, is considered desirable, it is in Parliament, as my Lord has said, that the power must be sought. The Courts have always taken a strong view with regard to these matters where people are held in confinement against their will, and, unless legal authority is shown, the Court has always ordered the discharge of the person so held. It seems to me impossible to say that when midnight struck on June 23–24, 1931, there was any legal authority in the keeper of the institution to hold the defective. Even assuming that the order was made on June 29—and for the reasons expressed by Slesser L.J., and the grounds which he stated, which I entirely share, I do not think it was—I can find no legal justification for having held the defective from June 24 to 29.

Under these circumstances, I agree that the writ of habeas corpus should issue, and this appeal should be allowed.

REX
v.
THE
BOARD OF
CONTROL.
WINTERFLOOD,
Ex parte.

Appeal allowed.
Rule absolute.

Solicitors for appellant: *E. A. R. Llewellyn & Co.*

Solicitor for Board of Control: *Solicitor, Ministry of Health.*

R. F. S.

1938
May 2.

HIBERNIAN BANK, LIMITED *v.* GYSIN AND HANSON.

Bill of Exchange—Words prohibiting transfer—Crossing—"Not "negotiable"—To payee's order only—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 8, 81.

By the Bills of Exchange Act, 1882, s. 8, sub-s. 1: "When a "bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between "the parties thereto, but is not negotiable."

A bill was drawn by the Irish Casing Company, Ld., payable three months after date "to the order of the Irish Casing Co. Ld. only" for 500*l.*, and was crossed "not negotiable." The defendants were the drawees and acceptors of the bill. The drawers indorsed the bill to the plaintiffs for value, and when the bill was dishonoured by non-payment, the plaintiffs sued the defendants for the amount of the bill and interest. The plaintiffs admitted that the Irish Casing Company Ld., at the date when the bill became due was indebted to the defendants in a sum exceeding the amount of the bill:—

Held, that the crossing "not negotiable" and the word "only" in the body of the bill sufficiently prohibited transfer so as to render the bill not negotiable within the meaning of s. 8, sub-s. 1, and that the plaintiffs could not recover.

Dicta of Lindley and Fry L.JJ. in *National Bank* v. *Silke* [1891] 1 Q. B. 435, 439, that a bill payable to order cannot be made not transferable, not followed.

Meaning of "not negotiable" as used in the Bills of Exchange Act, 1882, discussed.

ACTION in the Commercial List before Lewis J.

This was an action by the holders for value of a bill of exchange against the acceptors, the bill having been dishonoured on presentation for payment. The bill, which was dated February 23, 1937, and was drawn by the Irish Casing Company, Ld. was in the following form:—

"Three months after date pay against this first of exchange "to the order of the Irish Casing Co. Ld. only the sum of 500*l.* "effective value received."

The bill, which was crossed "Not negotiable," was drawn upon the defendants, and was accepted by them "payable at "Barclays Bank, Ld., West Smithfield St., E.C.1." It was indorsed by the drawers and transferred to the plaintiffs for value.

The bill was due for payment on May 26, 1937, but was dishonoured on presentation and protested on the following day.

The plaintiffs claimed 500*l.*, and 4*l.* 11*s.* for interest and notarial charges. In their defence the defendants pleaded that if, which they did not admit, the document sued on was a bill of exchange, it contained words prohibiting transfer or indicating an intention that it should not be transferable, that is to say, (1.) the crossing "not negotiable," and (2.) the words "pay to the order of the Irish Casing Co. Ld. only." (1)

They alleged that the plaintiffs had no right of action on the bill, or, in the alternative, that they had no better right of action than the payees, the Irish Casing Company, Ld.; and that the said payees were indebted to the defendants in a sum exceeding 504*l.* 4*s.* 11*d.* under a debenture dated December 16, 1936, issued by the Irish Casing Company, Ld., to the defendants, whereby they covenanted to pay the defendants 1250*l.* on March 31, 1937.

It was admitted by the plaintiffs for the purposes of this action, that the Irish Casing Company were on May 26, 1937, when the bill became due, indebted to the defendants in a sum exceeding the amount of the bill. It was admitted by the defendants that the plaintiffs had discounted the bill on March 22, 1937, and placed the amount thereof, 500*l.*, to the credit of the current account of the Irish Casing Company, Ld.

C. E. Rochford for the plaintiffs. The idea that a bill payable to order should not be transferable or negotiable is out of keeping with its character and object in commerce.

---

(1) The Bills of Exchange Act, 1882, provides :—

Sect. 8, sub-s. 1 : "When a bill "contains words prohibiting transfer, or indicating an intention "that it should not be transferable, it is valid as between the "parties thereto, but is not negotiable."

Sub-s. 4 : "A bill is payable to "order which is expressed to be "so payable, or which is expressed "to be payable to a particular "person, and does not contain "words prohibiting transfer or "indicating an intention that it "should not be transferable."

Sect. 81 : "Where a person "takes a crossed cheque which "bears on it the words 'not "'negotiable,' he shall not have "and shall not be capable of "giving a better title to the cheque "than that which the person from "whom he took it had."

1938

HIBERNIAN BANK, LD. *v.* GYSIN AND HANSON.

Indeed it has been said that no bill which is expressed to be payable to order or to bearer can be made not transferable or not negotiable. That is the view expressed by Lindley and Fry L.JJ. in *National Bank* v. *Silke.* (1) Fry L.J. there says that the Bills of Exchange Act, 1882, s. 8, sub-s. 1, divides bills into three classes—"bills not negotiable, bills payable to "order, and bills payable to bearer, so that a bill payable "to order must always be negotiable." If a bill payable to order is to be not negotiable, it should be drawn "payable to "A.B. only," and that is the effect of s. 8, sub-s. 1. Here the bill is an order bill. The word "only" means that the only person who can give the order is the Irish Casing Company, Ld. If, however, it is possible under s. 8 to limit the power to transfer an "order bill" so as to make it not negotiable, it must be done by clear and unambiguous words. It is sufficient for the plaintiffs here to establish that the words used will not do. "Payable to drawer's order only" is not enough, nor are the words "not negotiable." On a cheque the meaning of the words "not negotiable" is defined by s. 81 of the Act. It does not prohibit transfer, but limits the transferee's title so that it is no better than that of his transferor. That is the only place in the Act where the words "not negotiable" are mentioned, and no other meaning can be given to them in construing these documents, if the words have any effect at all. [He referred to Paget on Banking, 4th ed., p. 114.] A restrictive indorsement, as "pay D. only" may be used prohibiting further negotiation of a bill (s. 35), but, subject to that, a bill "negotiable in its origin" (s. 36) so continues until discharged by payment.

Valentine Holmes for the defendants. The words "not nego- "tiable" coupled with the words " to the order of the Irish "Casing Co. Ld. only" are sufficient to prohibit transfer and indicate an intention that the bill here should not be transferable within s. 8, sub-s. 1, of the Bills of Exchange Act. Sect. 8, sub-s. 1, must be read in conjunction with sub-s. 4, by which "a bill is payable to order, which is expressed "to be so payable, or which is expressed to be payable to a

---

(1) [1891] 1 Q. B. 435.

"particular person, and does not contain words prohibiting "transfer."

The words "negotiable" and "transferable" are used interchangeably in the Act. Thus in s. 31, sub-s. 1, a bill is "negotiated" when it is "transferred" so as to constitute the transferee the holder of the bill.

The nature of negotiation is described by Lord Blackburn in *Crouch* v. *Credit Foncier of England, Ld.* (1) The words "not "negotiable" here are plain enough, especially with the word "only" after the payee's name, to which the plaintiffs give no meaning at all. The word "only" means "payable to the "company only" or to some one who collects on its behalf. If this were not so, s. 8 would have no place at all in the Act.

The remarks of Lindley and Fry L.JJ. in *National Bank* v. *Silke* (2) on this point are dicta only, and the case is an authority only as to the effect of the particular words there written across the cheque. As regards s. 81 of the Act, that section says that the words "not negotiable" across a cheque shall bear a particular meaning, but it is not to be deduced that when written across a bill of exchange such as this they have the same meaning, or that they have no meaning at all. On the contrary they have their ordinary meaning, that the bill is not to be transferred. Except in s. 81, the word "negotiable" is used elsewhere in the Act in its every-day sense of "transferable" and not in the sense of a transfer free from equities. [He referred to Byles on Bills, 19th ed., p. 88.]

Rochford replied.

LEWIS J. [after stating the facts, continued:] This case raises an interesting question. It is a short point, and it is conceded by counsel on both sides that except in so far as the point was dealt with in the case of the *National Bank* v. *Silke* (2) it has never been decided by the Court. The plaintiffs' counsel says that that is because it is obvious that the learned judges in the case of the *National Bank* v. *Silke* (2) when they expressed their opinion about the point, were right. On the other hand, Mr. Valentine Holmes on behalf

(1) (1873) L. R. 8 Q. B. 374, 381.

(2) [1891] 1 Q. B. 435.

of the defendants says that it is so obvious, if you look at the sections of the Act, that the plaintiffs in this case must be wrong, that nobody has ever taken the trouble to test the matter in the Law Courts. The position is that a claim is brought for the sum of 504*l.* 4*s.* 11*d.* against the defendants as acceptors of a bill of exchange for 500*l.* dated February 23, 1937, drawn by the Irish Casing Company, Ld. and accepted by the defendants payable at Barclays Bank three months after date to the order of the drawer and indorsed by them, and now held by the plaintiffs as holders for the full value. The bill, which was for 500*l.*, was dishonoured on presentation, and the interest and other charges make up the full sum of 504*l.* 4*s.* 11*d.*

The plaintiffs have undertaken to satisfy me that this is a bill which is negotiable. The bill reads in this way : "Three months "after date pay against this first of exchange to the order of the "Irish Casing Co. Ld. only the sum of Five hundred pounds "effective value received." It is crossed "not negotiable," and Mr. Rochford, on behalf of the plaintiffs, says that in spite of the fact that the body of the document contains the word "only" and that it is crossed "not negotiable" that bill is negotiable.

The main point which he makes is this, that where the bill is made out to the order of A.B., that bill can never be rendered not negotiable. His second point is this, that even if it is possible to make a bill payable to order not negotiable, or not transferable, then, in the words of s. 8, sub-s. 1, of the Bills of Exchange Act, 1882, the bill must contain words prohibiting transfer or indicating the intention that it should not be transferable before it can be regarded as not negotiable ; and he says that the presence of the words "not negotiable" and the presence of the word "only" is not sufficient to render it not negotiable. He has placed great reliance upon *National Bank* v. *Silke* (1), in which an action was brought upon a cheque. The cheque was drawn to the order of J. F. Moriarty, Esq., for 450*l.*, and was crossed by the drawer "Account of J. F. Moriarty "Esq., National Bank, Dublin." Mr. Moriarty indorsed the cheque and sent it to the plaintiffs, the National Bank, at Dublin, with a letter directing them to credit his account with that sum. His account was then slightly overdrawn. The plaintiffs wrote acknowledging receipt of the cheque "for your credit." The cheque arrived in Dublin on the 30th, and the amount was at once placed to the credit of Moriarty, which made a balance of about 443*l.* to his credit. Eventually the cheque, when it was sent to London, was returned with orders not to pay, and eventually the action was brought by the National Bank against Mr. Silke. In the course of their judgments in that case Lindley L.J., who delivered the leading judgment, and Fry L.J. both dealt with the matter in passages which have been read by counsel on both sides. Lindley L.J. said: "I will assume for the purposes "of this case that under those provisions"—the provisions of s. 8, sub-ss. 1 and 4 of the Bills of Exchange Act—"you can draw a bill expressed to be payable to order or to "bearer, and yet make it not transferable; though I am disposed "to think that you cannot. But if you can, there must be plain "words prohibiting transfer or shewing an intention that the "bill shall not be transferable. Ambiguous words will not do." It appears to me that Lindley L.J. in that case is really deciding that if you can do it, which he does not in fact decide, it can only be done by words which clearly prohibit the transfer or clearly show an intention that the bill shall not be transferable.

---

(1) [1891] 1 Q. B. 435, 438–9.

Fry L.J. says very much the same thing. He says: "As "regards the first point"—that is the question whether you can make a bill payable to order not negotiable—"I am inclined "to think that s. 8 divides bills into three classes—bills not "negotiable, bills payable to order, and bills payable to bearer; "so that a bill payable to order must always be negotiable. "But assuming that a bill payable to order can be made not "negotiable under s. 8, sub-s. 1, I am clearly of opinion that "the words used in the present case neither prohibit transfer "nor indicate an intention that the cheque should not be "transferable."

Both those learned judges appear to me to be really deciding the second point—namely, whether or not the words which that particular cheque contained were sufficient to show a prohibition of transfer, or a clear intention that the bill should not be

1938

HIBERNIAN BANK, LD. *v.* GYSIN AND HANSON.

Lewis J.

transferable. The only words upon that cheque which were relied upon were the words of the crossing—namely, "Account of "J. F. Moriarty, Esq., National Bank, Dublin." It was held that the plaintiffs to whom the cheque was indorsed were entitled to recover from the drawer.

It is said that *National Bank* v. *Silke* (1) has always been relied upon for the proposition that a bill which is made out to order cannot be made a not negotiable bill; and those dicta of Lindley and Fry L.JJ. are relied upon as being an authority for that proposition. I should point out, as the plaintiffs have said here, that the learned author of Sir John Paget's book on Banking has (4th ed., at p. 114) adopted that view as being correct law, and he says that from the sections of the Act it is to be deduced, and it is demonstrated, that any bill on which the word "bearer" or "order" appears or is imported by the statute, "is and remains a negotiable bill, and that no words prohibiting "transfer or indicating an intention that it should not be "transferred have any place thereon or any effect on "negotiability."

Mr. Valentine Holmes, on behalf of the defendants, says, with truth, that the remarks of the very learned judges who decided *National Bank* v. *Silke* (1) were really only dicta, and their attention was only devoted to seeing whether the words on the cheque itself were sufficient to make it not negotiable. He points out that, if the plaintiffs are right, s. 8, sub-s. 1, of the Bills of Exchange Act means nothing at all, and need not be in the Act. I am inclined to think that he is right about that. Then he goes on to say that there are two reasons which show that this bill is not negotiable, or at least that there was an intention to make the bill not transferable, in the very clearest possible way, and the first is the word "only." He does not rely so strongly on the word "only" (although he says that some weight must be attached to it) as he does on the expression "not negotiable." As I have said, the words are "to the order of the Irish Casing Co. Ld. only," and Mr. Valentine Holmes argues that that must mean that instead

(1) [1891] 1 Q. B. 435.

of the bill being paid to the Irish Casing Company, Ld., or to the order of any one else to whom they may order it to be paid, it is only to be paid to the Irish Casing Company, Ld., which of course does not prohibit their sending it to their bank as their agents for collection.

He relies more upon the words "not negotiable," and he asks the rhetorical question: "What words are more apt to "express that the bill is not to be negotiable than to put across "the face of it 'not negotiable'?" He prays in aid s. 81 of the Act, upon which also counsel for the plaintiffs relies. Sect. 81 of the Act is the only section, as far as I am aware, which deals with the words "not negotiable." That section is dealing only with cheques, and it reads: "Where a person takes a crossed "cheque which bears on it the words 'not negotiable', he " shall not have and shall not be capable of giving a better " title to the cheque than that which the person from whom " he took it had." Counsel for the plaintiffs says that that indicates that the words "not negotiable," when you are construing the Bills of Exchange Act, do not mean what they appear to mean, and that when the document is marked "not "negotiable" the only effect of those words is to show that the document is transferable, but does not give any better title to the transferee than that which the transferor had. Mr. Valentine Holmes, on the other hand, prays in aid that section, and says that the words "not negotiable" mean that it is not negotiable, and that it cannot be negotiated or transferred. He says that when that appears on a cheque, it has not its literal meaning, but the meaning which is given to it by the terms of s. 81, and the mere fact that that section is put into the Act, and deals with cheques which are marked "not negotiable," saying that the words "not negotiable" are to be interpreted in a certain way, and to give certain rights, shows that that was an exception to the obvious common-sense meaning of those words. He says that it is quite clear that anybody who writes the words "not negotiable" across a bill of exchange means what he says—namely, that the bill is not to be transferred and is not to be negotiated.

I have some hesitation in deciding the case in this way,

1938

HIBERNIAN BANK, LD.
v.
GYSIN AND HANSON.

Lewis J

because it would appear from my judgment that I am paying no regard to the decision of the Court of Appeal, in which Lindley, Bowen and Fry L.JJ. constituted the Court. But I think the argument which Mr. Valentine Holmes has presented to me is a very forcible one, and the question which the Court had before it in *National Bank* v. *Silke* (1) was not the question which I have before me to-day, while the observations of Lindley and Fry L.JJ. were really only dicta. On the view that I have formed, as a result of the argument that I have heard, there is in this case a document, a bill of exchange, payable at three months, upon which it was expressly stated that it was not to be transferred or negotiated.

I cannot conceive any stronger words written across a bill of exchange than the words "not negotiable." They must have some meaning, and they clearly do not have the same meaning as if they were written across a cheque. They say in the clearest possible terms that the bill of exchange is not to be negotiated, and I have difficulty in appreciating the argument put forward by the plaintiffs that no bill of exchange payable to order can ever be "not negotiable." In my view that argument is not tenable, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Stibbard, Gibson & Co.*
Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

F. P. F.

---

(1) [1891] 1 Q. B. 435.

JOSEPH EVA, LIMITED *v.* REEVES.

C. A.
1938
March 1, 2, 18.

[1936. J. 2678.]

Accident—Motor-cars—Collision—Cross-roads—Traffic Lights—Driver crossing against red light—Negligence—Duty of driver crossing with green light—Contributory Negligence—Highway Code—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 45, *sub-s.* 4—*Traffic Signs* (*Size, Colour and Type*) *Provisional Regulations*, 1933, *reg.* 28.

A driver of a motor-car who enters a cross-roads when the traffic lights are in his favour is not under any obligation to assume that the driver of another vehicle may be entering the cross-roads from left or right with the red light against him.

The rules of the Highway Code and s. 45, sub-s. 4, of the Road Traffic Act, 1930, must be read in connection with the legislative provisions in force in regard to traffic lights, and they cannot be read as imposing any special duty of care towards a person unlawfully entering the crossing.

When therefore a driver entered the cross-roads with the green light in his favour and accelerated to pass traffic on his left going in the same direction which blocked his view to the left until it was too late to avoid a collision with a vehicle which had entered the cross-roads from the left against the red light, he was not guilty of contributory negligence.

APPEAL from Greaves-Lord J.

The facts of this case, which are fully stated in the judgments, were briefly as follows :—

At a place where Lambeth Road and St. George's Road crossed each other, a collision occurred on July 11, 1936, by daylight between a motor-van belonging to Joseph Eva, Ld., and a police car driven by a police officer called Stanley Reeves. There were traffic lights at the cross-roads. The motor-van was proceeding along Lambeth Road from west to east and the police car along St. George's Road from south to north.

Two actions were brought, the first by Joseph Eva, Ld., against Reeves claiming 81*l.* 6*s.* 7*d.* damages for injury to the motor-van and by Reeves against Joseph Eva, Ld., claiming damages for the injuries caused to him, including the loss of an eye. The evidence was contradictory as to the condition of the lights when the motor-van and the police car entered the cross-roads, but, as the Court of Appeal accepted the findings of Greaves-Lord J. as to this, it is unnecessary to set out the evidence on this head. Reeves's evidence, however, made it clear that as the police car entered the cross-roads he accelerated to pass three lines of traffic on the left of the police car which included a tram and a bus and blocked the view to the left entirely. He had accelerated to twenty-five to thirty miles an hour and was just approaching the leading vehicles on his left when he saw the van and swerved and applied his brakes. It was too late, however, to avoid a collision.

Greaves-Lord J. said he accepted the evidence of those witnesses who said that the light had changed from amber to red before the van entered the cross-roads. But then came the question what was the position of Reeves. In the circumstances he must have entered the crossing with the lights in his favour. Then did the mere fact that the lights were in his favour justify him in crossing this difficult junction in the way he did without regarding traffic coming from Lambeth Road ? In the main it certainly did not, because nothing in the conduct of the driver of the van could justify Reeves crossing without taking reasonable care. But did he cross without reasonable care ? He had the right to put some reliance upon the extent of time which had passed at the time he was crossing, but he had to take into consideration the fact that a vehicle might have passed the lights after their change from green to amber and might be moving slowly. The chances, however, of a slow vehicle like a horse and cart being caught by the change of lights in a way that it could not stop were small. What happened here was that the police car being some twenty yards from the crossing, going at a comparatively fast pace, came to cross at a time when red having turned to amber was succeeded by a green light. Starting to cross, the driver Reeves accelerated under conditions which entitled him to assume that there would be no late invader from the Lambeth Road of what had become a restricted zone. Reeves was momentarily and by force of circumstances more or less off his guard as to any traffic coming from his left, but he (his Lordship) had yet to learn that, if the condition of the road was such that it showed a wide comparatively clear road, it was negligence to cross on the outside of traffic going in the same direction. After very careful consideration and with some hesitation he had come to the conclusion that Reeves was not guilty of negligence in the course that he took, and that the accident was brought about by the driver of the van in entering the restricted zone at a time when the lights were against him. He was satisfied therefore that the accident happened without negligence on the part of Reeves and entirely owing to the negligence of the driver of the van. That being so, Joseph Eva, Ld.'s action for damages to their van must be dismissed, and damages remained to be assessed in respect of the injury to Reeves. After consideration of all the circumstances relating to this issue, he came to the conclusion that the sum of 3000*l.* was the fair sum to be awarded for damages. He therefore gave judgment in favour of Reeves with the costs of both actions.

Joseph Eva, Ld., appealed. The appeal was heard on March 1 and 2, 1938, and judgment given on March 18, 1938.

Sir William Jowitt K.C., *H. D. Samuels K.C.*, and *R. Armstrong-Jones* for the appellants. Greaves-Lord J. was wrong in finding on the evidence that the appellants' van driver went on to the cross-roads when the light was red. The weight of the evidence is in the opposite direction—namely, that the van driver entered the crossing when the traffic light was showing green in his favour, or at the worst just turned to amber as he came up to it too late for him to stop. Under reg. 28 of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, he was on either view justified in what he did. Reeves was admittedly in a hurry, as his act in driving on the right-hand side of the road and accelerating to pass the traffic on his left shows. The evidence is that the traffic on the left had not then begun to move, which shows that Reeves had anticipated the time when the traffic light facing him would turn green.

Alternatively, if the appellants' van driver was guilty of negligence there was contributory negligence on the part of Reeves. Contrary to reg. 28 and the provision as to lights in the Highway Code Reeves failed to advance with reasonable care. He accelerated in order to pass the traffic on the left although that traffic prevented his seeing traffic coming from the left. It was his duty to keep such a look-out although he crossed with the green light in his favour. There was always the possibility that some one would cross against the lights or on the amber just before the light turned red. Further, Reeves acted contrary to r. 34 of the Highway Code, which says "never overtake at cross-roads."

John Morris K.C. and *Fox-Andrews* for the respondent. Greaves-Lord J. was right in his finding as to the state of the lights. But in any case the Court of Appeal ought not to interfere with his findings of the facts. The decision of a judge who sees the witnesses must largely depend on his view as to their reliability. This is essentially that type of case where the appellate Court cannot reverse the judge's findings of fact: *Powell* v. *Streatham Manor Nursing Home.* (1)

Further the respondent was not guilty of contributory negligence. Having the green light in his favour he was free to cross on the assumption that no one would cross his path as the result of disregarding a red light.

[SCOTT L.J. The Code says that special care is to be taken at cross-roads. Did the respondent do this?]

The Code must be read in relation to the fact that there were traffic lights at these cross-roads. In such a case all the driver has to do is to satisfy himself that the light is in his favour.

[SCOTT L.J. May it not be negligence to accelerate in crossing when the view to the left is obscured?]

It is contended not. The respondent need look neither to right nor left as he was proceeding with the light in his favour: see *Bailey* v. *Geddes.* (2) He must assume that no one is crossing against the lights. A cross-roads is not a cross-roads in the full sense when the traffic on either side is held up by traffic lights, and the rules of the Highway Code must be

(1) [1935] A. C. 243.

(2) [1938] 1 K. B. 156.

interpreted in the light of this fact. No question of contributory negligence can arise here, as the appellants' van crossed against the red lights: see *Bailey* v. *Geddes*. (1)

[SIR WILFRID GREENE M.R. If there had been an unimpeded view to the left, it would not have been right for the respondent to go on so as to cause a collision, even with a wrongdoer.]

That is so, but here the respondent could not see the van crossing, and he was under no duty to do so. For the system to work well all traffic must move forward as soon as the green light shows.

Sir William Jowitt K.C. in reply.

[SIR WILFRID GREENE M.R. We think the decision as to the condition of the lights must stand.]

Then the only question that remains is whether there was contributory negligence on the part of the respondent. Reeves's evidence alone establishes this against him. According to his own evidence he accelerated as soon as the green light appeared to overtake and pass the vehicles on his left, and was going twenty-five to thirty miles an hour when he first saw the appellants' van. It is a fallacy to say that a driver with the green light in his favour is entitled to assume that there will be no late invader of what has become a restricted zone. Reg. 28 (iii.) of the Provisional Regulations of 1933 says that the green light indicates that vehicular traffic may pass and proceed straight on or to the left or to the right "with due "regard to the safety of other users of the road" and the Highway Code prepared under s. 45, sub-s. 4, of the Road Traffic Act, 1930, and issued by the authority of Parliament, says the same thing in more popular language.

[SIR WILFRID GREENE M.R. Is not the real question whether the respondent was entitled to assume that the particular vehicle would not be on the cross-roads?]

A driver ought to be prepared for the unexpected at cross-roads. Reeves broke rr. 10, 19, 23, 28 and 34 of the Highway Code. He could not pull up within the distance he saw the road to be clear, and took no special care passing an obstruction to his clear view of traffic. He also overtook so as to endanger another road user, and overtook at cross-roads. He really gambled on there being nothing in the way.

---

(1) [1938] 1 K. B. 156.

[SIR WILFRID GREENE M.R. It was only possible for the two cars to be at the same place at the time of the accident because the driver of one of them was a law-breaker.]

Reeves had a general duty to any one who might be there. A vehicle crossing slowly from the left might properly have started crossing when the light was amber.

Cur. adv. vult.

March 18. SIR WILFRID GREENE M.R. On July 11, 1936, a collision took place at the point where Lambeth Road crosses St. George's Road between a van belonging to the appellants and driven by their employee and a police car driven by the respondent Reeves. Reeves, who is a police officer, had received in his car a wireless call as the result of which he was proceeding along St. George's Road from south to north. In the car with him was a wireless operator. The appellants' car was proceeding along Lambeth Road from west to east. Both roads have upon their surface a double line of tram-rails which intersect in the middle of the crossing and the accident took place at some point just north-east of the point of intersection. The accident took place in broad daylight in the early afternoon. It was raining and the roads were wet. As the result of the accident the appellants' van was damaged, but Reeves unfortunately suffered severe injuries, including the loss of his left eye. Each party brought an action against the other. The actions were consolidated and Greaves-Lord J. gave judgment for Reeves for 3000*l*. damages and costs. From that judgment the appellants appeal.

The appellants' case before Greaves-Lord J. and in this Court was presented under two heads. First it was alleged that the appellants' driver was not negligent and that the accident was entirely due to the negligence of Reeves. Alternatively it was said that, if the appellants' driver was negligent, nevertheless there was contributory negligence on the part of Reeves. The learned judge found against both contentions.

C. A.
1938

Joseph Eva, Ld.
v.
Reeves.

Sir Wilfrid Greene M.R.

The cross-roads in question are provided with traffic lights and the usual steel lines marking the places where vehicles halted by the traffic lights must stop.

The appellants' case was that the traffic light on the north side of Lambeth Road to the west of the crossing by which their driver's progress into the crossing was controlled was showing green at the moment when he passed it. Alternatively it was said that if it was not green it had changed from green to amber at the moment when he reached the steel line, and that in the circumstances he was entitled to proceed across St. George's Road. It was further said on the appellants' behalf that Reeves passed the traffic light on the west side of St. George's Road which controlled his progress across Lambeth Road at a time when it showed red or, at best, red and amber. Alternatively it was said that if it was showing green when he passed it he had no right to cross Lambeth Road without taking due precautions to see that he did not come into collision with the appellants' van which, on the hypothesis stated, was lawfully crossing St. George's Road.

The crucial matter with regard to these contentions was, of course, the nature of the signals shown by the two sets of traffic lights at the relevant points of time. There was a conflict of evidence in the Court below on this point, but the learned judge accepted the evidence of witnesses who said that the traffic light in Lambeth Road was showing red when the appellants' van passed the steel line and that the traffic light in St. George's Road was showing green at the time when Reeves passed it. Upon this finding of fact the appellants' driver was clearly guilty of negligence. We were invited to say that the learned judge's conclusion upon this issue should be set aside, but in my judgment this Court ought not, in the circumstances, to set aside the judge's finding of fact. There was, it is true, a substantial body of evidence the other way, which the judge could have accepted, if he had thought it right to do so. But he saw the witnesses and we ought not to interfere with his finding upon our own view of the evidence and the probabilities of the case. As Lord Sumner said in *S.S.*

C. A.
1938

JOSEPH EVA, LD. *v.* REEVES.

Sir Wilfrid Greene M.R.

Hontestroom (*Owners*) v. *S.S. Sagaporack* (*Owners*) (1): "the "higher Court ought not to take the responsibility of reversing "conclusions so arrived at, merely on the result of their own "comparisons and criticisms of the witnesses and of their own "view of the probabilities of the case."

I accordingly proceed to consider the second argument upon the basis that the facts with regard to the traffic lights were as found by the learned judge. He also found that the traffic light in St. George's Road turned to green at a time when Reeves's car was some twenty or thirty yards away. At that time there was at the steel line a tram, northward bound, on the near-side set of rails in St. George's Road. On its left there was an omnibus with a car in front of it and another car was on the left of the omnibus. It is not in dispute that Reeves was driving at a smart pace from twenty-five to thirty miles an hour, and that in order to get in front of the traffic to which I have referred he overtook it on the right, going well over the crown of the road on the off-side in doing so. There was at the time in St. George's Road, at the steel line on the opposite side of the crossing, one omnibus, southward bound. Reeves stated that as he overtook the vehicles on the south side of the crossing they had just started to move, with the result that his vision to his left in the direction of the appellants' van was obscured. As he passed the lights he looked to the right and saw that no traffic was coming westwards towards the crossing from Lambeth Road. His intention was to turn to the left side of the road as soon as he had overtaken the vehicles which, as he said, had started to move; but before he could do so he saw the appellants' van coming across his path and, realizing that a collision was inevitable, he turned to the right. The collision then took place.

It is to be observed that in view of the pace at which Reeves was driving, the fact that the traffic which he was overtaking had only just started to move and the fact that there was no southbound vehicle nearer the crossing than the southbound omnibus to which I have referred, Reeves's action in overtaking the vehicles on his left would have

(1) [1927] A. C. 37, 47.

involved no danger to a vehicle coming in the opposite direction to himself, for he had ample time to swing across to the left-hand side of St. George's Road before the southbound omnibus reached him.

Now it is said that Reeves was negligent in that, notwithstanding the fact that the light showed green in his favour, it was his duty in entering the crossing to proceed at such a pace as to enable him to avoid coming into collision with any vehicle entering the crossing from the west along Lambeth Road; and that he owed this duty to the appellants notwithstanding the fact that the appellants' van had passed its traffic light when it was showing red. By way of reinforcement of this argument, it is said that Reeves had no right to pass the northbound vehicles on the off-side of the road and that he acted in a way forbidden by certain provisions of the Highway Code.

The regulations relating to traffic lights are to be found in "The Traffic Signs (Size, Colour and Type) Provisional "Regulations, 1933" made by the Minister of Transport under s. 48 of the Road Traffic Act, 1930. The significance of light signals is stated in reg. 28. By para. 1 "the red signal "shall be taken as prohibiting vehicular traffic to proceed "beyond the stop line . . . . until the green signal is shown." By para. 3 "the green signal shall be taken to indicate that "vehicular traffic may pass the signal and proceed straight "on or to the left or to the right with due regard to the safety "of other users of the road. . . . ." Now it is beyond question that upon the learned judge's findings of fact the appellants' driver acted in breach of para. 1. In my opinion Reeves was entitled to assume that traffic approaching the crossing from the west would act in obedience to the statutory regulations and he was not bound to assume or provide for the case of an eastbound vehicle entering the crossing in disobedience to the red light. This does not, of course, mean that, if he had noticed the appellants' van in time, it was not his duty to take all reasonably possible steps to avoid coming into collision with it notwithstanding that the appellants' van was acting in breach of the regulations. But he did not see it and

I do not see how it can be said that he was under any obligation to assume the possibility of its presence. It is said that before entering the cross-roads he ought to have satisfied himself that there was no eastbound vehicle entering the cross-roads in defiance of the traffic light, and that by placing himself on the off-side of moving northbound traffic which obscured his vision he was guilty of negligence in depriving himself of the possibility of seeing traffic entering the crossing from the west. But if I am right in thinking that he was under no duty towards traffic entering the crossing in disobedience to the light to assume the possibility of such entry, it cannot have been negligence on his part to put himself in a position where such traffic, if it existed, would be invisible to him.

With regard to the suggestion that Reeves ought not to have overtaken the northbound traffic on the off-side of the road, it does not appear to me that his action in so doing has any relevance to the present question. As I have already pointed out, the course which he took involved no danger to the southbound traffic in the circumstances, and if it had not been for the breach of the light signal regulations by the appellants' driver, the manœuvre would have been carried out with perfect safety. Here again, in deciding whether or not to execute such a manœuvre, Reeves was not, in my opinion, under any duty to assume the presence on the crossing of a vehicle which had got there in defiance of a light signal. Under r. 27 of the Highway Code, tramcars may be overtaken on either side, subject to any local provisions to the contrary. It is not suggested that there were any such local provisions.

So far I have been considering the question without regard to the breaches of the Highway Code of which it is said that Reeves was guilty. The effect of such breaches as bearing on the question of negligence or other liability is stated in s. 45, sub-s. 4, of the Road Traffic Act, 1930, as follows: " A failure "on the part of any person to observe any provision of the "highway code shall not of itself render that person liable to "criminal proceedings of any kind, but any such failure may "in any proceedings (whether civil or criminal, and including "proceedings for an offence under this Act) be relied upon by "any party to the proceedings as tending to establish or "to negative any liability which is in question in those "proceedings."

It is to be observed that failure to observe a provision of the Code does not in itself necessarily constitute negligence and that the effect to be given to such failure must necessarily depend upon the circumstances of the case. In some circumstances such failure may be sufficient to establish civil liability. In other cases the fact of failure may have little, if any, relevance to the actual cause of the accident. The Highway Code is a general code applying to the roads of the country in general. Rule 34, on which the appellants particularly rely, says: "Never overtake at cross-roads." Where traffic at cross-roads is not regulated by traffic lights, or the police, this regulation is an obvious canon of good driving, since overtaking at unregulated cross-roads necessarily involves a risk to other traffic lawfully on the highway. But it is a very different matter where traffic at cross-roads is regulated by traffic lights or the police. The effect of such regulation is to give to the traffic, in whose favour the lights are showing, the monopoly of the crossing. When the traffic stream is set free by the green light the vehicles in it proceed in the direction in which they are going upon that basis. Faster moving vehicles overtake vehicles on their near side which are moving at a slower pace. This is what regularly happens at every controlled crossing, and, if it is a breach of the Highway Code to do it, that Code is being broken at every moment of the day. Of course, an overtaking vehicle in such circumstances must have due regard to traffic coming in the opposite direction and to the possibility that vehicles in the stream of traffic may desire to turn to the right or to the left into the road across which the stream is proceeding. But the mere act of overtaking appears to me to be of no relevance on an issue of negligence such as is raised in the present case.

The regulations of the Code and the provisions of s. 45, sub-s. 4, of the Road Traffic Act, 1930, must be read in connection with the legislative provisions in force in regard to traffic lights. I cannot read those regulations as imposing

Sir Wilfrid Greene M.R.

upon a driver who acts in obedience to traffic lights any special duty of care towards a person who is unlawfully driving across his path. This applies to all the regulations of the Code upon which reliance was placed and I need not deal separately with them.

The last argument to which I need refer is to the following effect. It is said that it was the duty of Reeves, even though the traffic light was favourable to him, to enter the crossing in such a way and at such a pace as not to run down any vehicle lawfully on the crossing; that if the appellants' van had been moving at a slower pace it might have been lawfully on the crossing at the point of collision because it would have passed its traffic light in Lambeth Road, west of the crossing, earlier than it in fact passed it, at a time when that light would have been showing green or amber; and that for this reason Reeves was guilty of negligence. This argument appears to me to rest on a fallacy. It is true that, notwithstanding that the light was in his favour, Reeves owed a duty to any one lawfully on the crossing; but negligence is the breach of a duty owed to the person who complains of it; and the fact that in different circumstances a duty would have been owed to the appellants or to some other person does not lead to the conclusion that a duty was owed to the appellants in the circumstances as they actually existed.

The appeal is dismissed with costs.

SCOTT L.J. I have now had the advantage of reading the judgment of the Master of the Rolls, and agree with it so completely that I can omit a good deal of what I had written; but possibly it may be helpful if I still express in my own way some part of what I had intended to say. I do so, because of the extreme importance in the cause of safety on the roads of bringing home to drivers as definitely and even as graphically as possible what the law now is as to traffic at cross-roads controlled by lights without police. Nothing but implicit obedience to the absolute prohibition of the red—and indeed of the amber, subject only to the momentary discretion which it grants—can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic, which next to safety is the main purpose of all traffic regulation. Nothing again will help more to encourage obedience to the prohibition of the lights, than the knowledge that, if there is a collision on the cross-roads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the left or right.

In the course of the hearing before us, it became plain that the stories told by the two sides at the trial had been directly contradictory, and that the conclusions of the learned judge had been much influenced by his views of the individual credibility of the witnesses. On the questions of fact counsel for the appellants were unable to point either to any specific insufficiency in the positive evidence on which the learned judge had acted, or to any crucial error in his inferences. The vital issue is, and was, the condition of the lights at the time when the respective vehicles approached and passed them. For the well known reasons stated by the Master of the Rolls it was impossible for us to revise his decisions even if we doubted them, because so much turned on which witnesses he believed. We accordingly intimated to counsel during the appeal that we could not interfere with the judge's findings of fact.

I confess that during the argument of the appeal I felt some doubt as to whether as trial judge I should have arrived at the same conclusions of fact, and I note that MacKinnon L.J., whose judgment I have also had the privilege of reading, expresses such a doubt ; and I gather that the Master of the Rolls feels it also ; but I have read through the whole of the evidence again carefully, and do not now doubt the learned judge's two crucial conclusions of fact—namely, that the Eva's driver entered the cross-road area after the red had opened against him, and that Reeves in the police car had had the green open to him for some twenty yards before he entered it. The Master of the Rolls has stated all the material facts, and I need not repeat them ; but I think it fair to the learned judge to explain why I now think he was right in his two inferences of fact. For this purpose I must make one or two quotations from the evidence of one independent witness. There is a further possible advantage in this course—namely, that the vividness of the picture drawn by an eye-witness may help any motorists who may chance to read our judgments to visualize the scene and so to appreciate the more clearly what we have to say on the duties of motorists in a case like the present, and the bearing of the Highway Code and Lights Regulations on the issues of negligence.

At the trial the fundamental questions were, did Eva's van cross the stop-line against the red ? and was the green open to Reeves when he crossed his stop-line, and how far away was he when it opened ? The evidence most favourable to Eva's case was that given by the driver of the southbound omnibus in St. George's Road held up by the amber and then the red at the stop-line on the north side of the cross-road : and the evidence given by the driver of the northbound tram which was standing in St. George's Road when it was passed by Reeves in the police car as he accelerated into the cross-roads. This evidence was to the effect that Eva's van had already crossed its stop-line before its light turned red, with a suggestion that it was near its stop-line before the green changed to amber. On its face that evidence seems strong, but I think it was open to the learned judge to reject that evidence. There was equally strong evidence directly opposed to it given by one Tasker, the driver of a westbound lorry held up by the lights in Lambeth Road and standing at its stop-line on the east side of the cross-roads. His evidence was wholly accepted by the learned judge, and I can see no reason for doubting his conclusion.

The lights facing the plaintiffs' van as it approached from the west were necessarily identical in time and colour with the lights facing Tasker. On pp. 61–62 of Day 3, after saying that he remembered seeing the plaintiffs' van, as it approached him from the opposite direction, he gave the following answers :—

"(Q.) Just tell my Lord, what did you notice about that "vehicle ; in your own way, please ? (A.) Well if I may tell "my Lord how everything appeared to me ?

"(Q.) Yes. (A.) When I was driving along Lambeth Road, "I noticed two things : first, road clear : second, the lights.

"GREAVES-LORD J. Yes ? (A.) Knowing the green light had "been green for some considerable while, I realized that it must "soon very shortly be changing ; so I looked in the opposite "direction to see if any vehicles were coming the opposite way, "so that should he cross a rubber mat on the inside of the "crossing before I should, the lights most likely would remain "green ; they would not have been remaining green over a "period of seconds ; but he was further away from his respective rubber mat than I was. Before I crossed my rubber mat "the lights changed to amber, and before arriving at the "stopping-line they changed to red. I was stationary then : "nothing else to do but wait ; but, to my amazement, I saw the "covered van still continuing across the crossing."

This was followed on p. 63 by the following :—

"(Q.) Did he slacken speed at all, as far as you saw ? "(A.) In my opinion, not until he realized the traffic was on "the move and he saw the police car and the accident could "not be avoided."

"The traffic" was thereupon identified as the northward-bound traffic in St. George's Road, which had been held up by the red lights showing south, and the witness then gave this further evidence :—

"(Q.) And you then saw this traffic ? (A.) I saw two private "cars definitely about their own length into the crossing which "was passed by the police car.

"(Q.) Tell us in your own way ; do the best you can about "it ? (A.) Well, when I saw possible danger, I naturally "looked to my left. I saw two small cars on the move, about "their own length into the crossing, and suddenly they were "passed by a police car, which came along on the off side tram "track.

"(Q.) Up to this time, had you ever moved, or thought of "moving? (A.) No, sir."

After the collision Tasker got out of his lorry and inspected the ground for skid marks. He found them from both vehicles —from the police car "just a faint line of about two yards on "some stone cobbles"; but from Eva's van he traced skid marks all the way back from the point of collision to a point "about his own length over his steel stopping-line." The relevance of the starting-point of the long skid mark left by Eva's van, as it strikes me, is that it shows when its driver first suddenly realized the imminent danger of collision with the police car—which he could not see until it had already passed the tram and come into view in the open area of the cross-roads. Now if the van had passed its stop-line any substantial time before its amber light changed to red, it would have got much further into the cross-roads before the green showed to the police car and the other northbound traffic in St. George's Road. It follows that on the hypothesis of Eva's van having got close to its stop-line before its green turned to amber, the skid mark would necessarily mean that the police car had crossed its stop-line at the very latest only just after its light had begun to show amber and was still showing red with the amber. But this conclusion is directly contradicted by Tasker's evidence that he saw the small cars on the move before the police car passed them.

The learned judge accepted Tasker's evidence; and if true it certainly justifies his finding that "the driver of Eva's van "started in the crossing against the lights." By these words I think he was intending to negative the suggestion that the car had crossed the line during the amber period at a moment when it was "so close to the stop-line that it could not safely "be stopped before passing the line"; that is, so as to bring it within the exception to No. 28 (iv.) of the Regulations of 1933 made under s. 48 of the Road Traffic Act, 1930.

As regards the police car the learned judge's finding was that the lights facing it changed from amber to green when it was still twenty yards south of its stop-line, and this finding, too, is unimpeachable. He believed Reeves. If then the police car had the green light open inviting him to proceed, and Eva's van was a transgressor against the red, there is obviously no ground left for any appeal unless, even in those circumstances, there is still some reason for holding that there was contributory negligence on the part of the police car. On this Eva's contention before us was that Reeves was guilty of a breach of duty towards the van in that: (*a*) he disregarded three of the cautionary rules of the Highway Code—namely, Nos. 23, 28 and 34; and (*b*) that he was guilty of bad look-out. The rules in question are as follows:—

> " (23.) Take special care at cross-roads, corners and bends.
>
> " (28.) Never attempt to overtake if by so doing you are "likely to inconvenience or endanger any other road user.
>
> "(34.) Never overtake at cross-roads."

Prima facie Reeves broke all three rules. Although his view was blocked to the left, that is, towards the traffic in Lambeth Road crossing from the west, he failed to take " any special "care " as required by r. 23, for he simply went straight on, as he supposed the green light permitted him to do. It is plain also, that in spite of r. 34 he did overtake at the cross-roads, for he passed the group on his near side just as it was moving forward again after the opening to it of the green light; and indeed he accelerated past it. He undoubtedly thereby in one sense " endangered another road user " under r. 28—namely, Eva's van. But the green light was a statutory advice to him to go on, if not a command; and I cannot see how he can be blamed for doing so. Perhaps it is easiest to state the position in terms of the action by Eva's against Reeves. The defendant's omissions to comply with the three rules cannot constitute negligence towards the plaintiffs unless the defendant owed the plaintiffs a duty to comply; and in my view such a duty towards the plaintiffs could not attach to the defendant, unless in the actual circumstances of the case the plaintiffs' van driver was in a position which brought him within the

C. A.
1938
Joseph Eva, Ld. v. Reeves.
Scott L.J.

contemplation of the rule as an intended beneficiary of its protecting care. This in my opinion he could not be. The red signal had prohibited his crossing his stop-line. He had no right to be in the cross-roads area at all. Indeed he had committed a statutory offence under s. 49 of the Act of 1930 by breaking reg. 28 made under s. 48. The defendant had therefore no duty to have him in mind in regard to any one of the three rules; and his omission to comply with them was shown to be wholly irrelevant to the issue, as soon as the breach of reg. 28 was established against the plaintiffs. In the circumstances of this case on the finding of the learned judge the defendant had no duty towards the plaintiffs until the defendant had passed well into the cross-roads, and then saw the law-breaking car coming across his track. It was then too late for him to do anything, and no suggestion was made that he failed in due care at that stage.

As I said at the outset, the essence of the lighting system is to prevent the presence on what the judge called "the restricted "area" of the cross-roads of any traffic from the red direction when traffic is ordered forward in the green light direction. Its object is not only to prevent collisions but also to prevent unnecessary delay at cross-roads: and if a car with the green just opened in its favour, summoning it forward, had to keep a look-out for traffic from the red direction, it would prevent that automatic resumption of forward movement by the vehicles temporarily held up, which is vital to the free circulation of traffic. To hold that such a car owes a duty to a law-breaker crossing from the red direction would undermine the whole system of lights regulation and defeat an important part of its purpose. It therefore follows, in my opinion, that rr. 23, 28 and 34 of the Highway Code must be read as qualified by the implied proviso that their commands or recommendations are subject to the overriding provision of the Traffic Lights regulations.

The only point which remains for consideration, is the argument of counsel for the appellants that there was a duty to them even on the assumption that their van driver was a trespasser against the red light, because a slow-moving vehicle might have met the defendant's car in precisely the same spot without having transgressed the lights regulations at all, since he might have crossed under the amber permissive words. But I do not think the plaintiffs can allege a duty to themselves, merely because another vehicle in different circumstances would have been owed such a duty. That argument is a fallacy.

I accordingly agree that the appeal should be dismissed with costs.

MacKinnon L.J. I also think this appeal fails.

We have had read to us from the shorthand notes all the material parts of the evidence called in the Court of first instance. My own impression is that if I had heard the case in place of the learned judge, I might have ordered judgment to be entered in terms other than those of the judgment now under appeal. But I am sitting in the Court of Appeal, with only the written record of the evidence previously given that I can depend upon. In these circumstances, my duty is that which has been defined by the House of Lords in various cases; most recently in *Powell* v. *Streatham Manor Nursing Home*. (1) I do not think I need read any part of that case.

Applying that principle, it is clearly impossible to set aside the essential findings of Greaves-Lord J.—namely, that the traffic light in Lambeth Road was red when Eva's van passed it, and the light in St. George's Road was green when Reeves passed it. And if that be so, then this collision was caused by the negligence of Eva's van in going through the cross-roads with the red light against him.

Sir William Jowitt, however, strenuously argued that, on the admitted facts, we ought to hold that there was contributory negligence on the part of Reeves, and that therefore his claim for damages should be disallowed. The argument involved considerations that apply to the many places where this system of traffic lights is in operation, and is for that reason of general importance. It was for that reason that we reserved judgment.

At cross-roads thus lighted, since the red light to east and

(1) [1935] A. C. 243.

west starts at the same moment as the green light to north and south, the result, if the prohibition of the red light is obeyed, is that one road is temporarily abolished as a thoroughfare, while the other exists as an open thoroughfare. If, as the judge found, the light Reeves approached was green before he reached it, he was prima facie entitled to consider himself as on the open thoroughfare, and to go forward, without any apprehension that, in breach of the prohibition from his red light, Eva's van driver or any one else on the crossing road would be intruding upon the thoroughfare that was closed to him. And as Reeves was entitled to be without such apprehension, I do not think it could be said that he was doing anything negligent in going freely forward, when he was unable, by reason of the traffic on his near side which he was passing, to see into Lambeth Road upon his near side.

But owing to the varying pace of vehicles of divers sorts, the system of traffic lights, when a change occurs, cannot work with absolute certainty. And the appellants rely upon one aspect of this uncertainty in order to assert a charge of negligence against Reeves.

It is not in dispute that the collision of these two vehicles took place at a point a little to the north-east of the centre point of these cross-roads. If the judge's finding that Eva's driver passed his traffic light when it was red be accepted, then he was clearly to blame. But it is said, no doubt truly, that Reeves might have collided at this same spot with a slow-moving vehicle that had passed the western traffic light in Lambeth Road when it was yellow, or even when it was green. Such a slow-moving vehicle so passing might be on a thoroughfare rightly open to it, as, on the judge's finding, Reeves's thoroughfare was open to him. But if they were both lawfully crossing one another's tracks, both of them must be to blame for the collision, or perhaps Reeves alone. In any case Reeves must, in such a case, be to blame because on his own case he was going forward when he could not see the approach of this slow-moving vehicle by reason of the other vehicles to his near side. Therefore, it is said Reeves ought, as a reasonable man, to have entertained the apprehension that there might be in existence such a slow-moving vehicle lawfully crossing his path, and he was negligent in going on so that, if there was such a slow-moving vehicle, he could not avoid it. Therefore he was negligent in this case, as well as Eva.

This is an ingenious argument, but I do not think it is a sound one. Negligence is the failure to take reasonable care. But the duty to take reasonable care is not to be measured by any abstract standard. The duty to be established against an alleged wrongdoer is a duty to him who makes the allegation. Eva's van was a motor-car of a car's capacity of speed: it was not a hearse, or a steam-roller, or a heavy cart drawn by a weary horse. Eva's driver, I think, cannot with reason say: "You hit me at this spot. If I had been a steam-roller, and "had passed my light when it was green, you would have hit "me in the same spot, and you would have been negligent. "Therefore, when you hit me in this spot, you must be equally "negligent." Reeves's answer, I think, must succeed: "The "question of my negligence, if any, is between you, with your "car, and me. Yours is not a slow-moving vehicle, and you "passed your light at red, not at green. What might be my "liability to the hypothetical owner of a steam-roller that "arrived at the spot where we collided is nothing to do with "you, or with my liability to you."

That the standard of care is relative to the two parties to the dispute and not some abstract standard, is, I think, illustrated by a consideration of another aspect of the problem of negligence. It is well settled that the duty of care by the owner or occupier of premises is relative to the person who is alleging its breach. If a trespasser claims damages against the owner of premises because he has fallen into a pit, the owner can say: "I owe no duty of care to you." The trespasser might argue, with as much logic as the appellants: "But if "an invitee had come along and been hurt by this pitfall you "would have been held negligent. Therefore you were "negligent in leaving it open. Therefore I can say you were "negligent, and negligent to me." The answer is obvious: "What might be my liability towards an invitee is perfectly "immaterial as between me and you a trespasser." And so in this case I think Reeves can say to Eva: "Even if, by "colliding with him at this spot, I might have been held "negligent as against a slow-moving vehicle that passed the "light when green, that is nihil ad rem on the question whether "I was negligent by colliding at this spot with your fast-"moving vehicle that had passed the light when it was red."

Appeal dismissed.

Solicitors: *Leonard Bingham & Co.*; *Ponsford & Devenish.*

H. C. G.

OXFORDSHIRE COUNTY COUNCIL *v.* OXFORD CITY COUNCIL.

C. A.
1938
Feb. 3, 4, 7;
March 7.

Local government—Alteration of areas—Act extending boundary of city—Transfer of districts from county to city—Subsequent Act making county council the district road authority and the poor law authority—Increased burden on county ratepayers—Adjustment of financial relations—Increased burden whether due to extension Act or to subsequent Act—Arbitration—Amount of compensation—Oxford Extension Act, 1928 (18 *&* 19 *Geo.* 5, *c. lxxxiv.*), *ss.* 4, 5, 33, 61—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 62—*Local Government* (*Adjustments*) *Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 19), *s.* 1; *Schedule, Part II.* (1.), (2.), (3.)—*Local Government Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 113, *sub-ss.* 1, 2; *s.* 117, *sub-s.* 4.

The Oxford Extension Act, 1928, which came into operation on April 1, 1929, transferred from the county of Oxford to the city of Oxford parts of certain rural districts and parts of certain poor law districts, and directed that there should be an equitable adjustment of financial relations as between the county and the city in respect thereof. By virtue of the Local Government Act, 1929, which came into operation on April 1, 1930, one year after the first mentioned Act, the county council of the said county became responsible for the maintenance of the district roads in these and other rural districts in the county, and for the administration of public assistance in these and other poor law districts in the county:—

Held, by the Court of Appeal (Greer and MacKinnon L.JJ., Bennett J. dissenting), that, although the burden of the maintenance of district roads and of public assistance would not have been thrown upon the ratepayers of the county at all unless the Act of 1929 had come into force, yet such increase of that burden as might be attributable to the transfer of the above mentioned areas from the county to the city was a consequence not of that Act but of the Oxford Extension Act, 1928, and that provision for it should, therefore, be made by an arbitrator appointed under the last mentioned Act to determine what sum should be paid by way of financial adjustment by the city to the county in respect of the transfer of these areas.

Godstone Rural District Council v. *Croydon Corporation* (1932) 96 J. P. 271, 275; 363, 366, observations considered.

Caterham Urban District Council v. *Godstone Rural District Council* [1904] A. C. 171, referred to.

Held, further (by Greer and MacKinnon L.JJ.), regard being had to the maximum amounts payable by way of compensation under the Rules contained in the Local Government (Adjustments) Act, 1913, Schedule, Part II., as amended by the Local Government (County Boroughs and Adjustments) Act, 1926, s. 5, and to the fact that during the year intervening between the dates on which the Acts of 1928 and 1929 respectively came into force the county did not incur any liability in respect of these matters, that the sum payable by the city to the county as compensation should comprise in respect of roads the average annual increase of burden for twenty years, and in respect of public assistance the average annual increase of burden for fourteen years.

Decision of the Divisional Court overruled.

SPECIAL CASE stated by an arbitrator for the decision of the Court pursuant to s. 62 of the Local Government Act, 1888, and s. 9, sub-s. 1 (*a*), of the Arbitration Act, 1934.

I.—The following facts were agreed between the parties :—

1. On April 1, 1929, the Oxford Extension Act, 1928, came into operation.

2. That Act provided as follows :—

By s. 4 the existing boundary of the City and County Borough of Oxford was extended to include certain added areas—namely, part of the Headington urban district and parts of the Headington rural district and of the Woodstock rural district, the added areas being in the administrative county of Oxford.

By s. 5 it was provided (inter alia) that parts of three parishes, namely—Cutteslowe, Water Eaton and Wolvercot, which were formerly included in the Woodstock union, and were transferred to the city of Oxford under the said s. 4, should be included in the Headington union, part of which was already situate in the city of Oxford and the remainder in the county of Oxford. As a result the whole of the Woodstock union, as reduced, was within the county of Oxford, as reduced, and the Headington union, as enlarged, comprised part of the city of Oxford, as enlarged, and part of the county, as reduced.

By s. 33, provision was made for the equitable adjustment of financial relations between the county and county borough. That section provided :—

> "(1.) In any case . . . . where the extension of the "existing city by this Act or any other provision of this "Act affects any financial relations or questions between "those areas or any adjustment which has been made with "regard to the said distribution or financial relations or

"questions, equitable adjustments may be made between "the areas interested.

"(2.) Any such adjustment as is authorised by sub-s. 1 "of this section may be made by agreement between the "councils of the city, the county and the county borough "affected, or by an arbitrator appointed by those councils.

". . . .

"(3.) In any case in which an agreement for equitable "adjustments as aforesaid has not been made or so far as "any such agreement does not extend the provisions of the "[Local Government] Act of 1888 relating to adjustments "between administrative counties and county boroughs "shall apply with the necessary modifications. . . . ."

Sect. 61 of the Act provided that: "Subject to the provisions "of this Act s. 62 (Adjustment of property and liabilities) of "the Act of 1888, shall apply to any adjustment which may "become necessary in consequence of this Act and for the "purposes of such application that section shall have effect—

"(*a*) As if in sub-ss. 5, 6, and 7 thereof the expression "'council' included any authority affected by this Act or "by anything done in pursuance of this Act; and

"(*b*) As if in the case of such authority not otherwise "empowered to borrow under any Act or on any security "or in any manner mentioned in the said sub-s. 6 that "subsection empowered the authority to borrow under any "Act relating to and conferring on the authority a power "to borrow on the security of all or of any of the funds "rates and revenues of the authority and in the manner "provided by the said Act but without the consent of any "other authority and subject to the requirement that all "money so borrowed shall be repaid within such period "as the Minister may sanction:

"Provided that where the authority affected by this Act or "by anything done in pursuance of this Act are the board of "guardians of a poor law union s. 62 (Adjustment of property "and liabilities) of the Act of 1888 shall apply with "respect to any necessary adjustment with the modifications specified in the First Schedule to the Poor Law

"(Dissolution of School Districts and Adjustments) Act, 1903."

3. Sect. 62 of the Local Government Act, 1888, provides :—

"(1.) Any councils and other authorities affected by this "Act or by any scheme, order, or other thing made or done in "pursuance of this Act, may from time to time make agreements "for the purpose of adjusting any property, income, debts, "liabilities, and expenses so far as affected by this Act or such "scheme, order, or thing, of the parties to the agreement, and "the agreement and any other agreement authorised by this "Act to be made for the purpose of the adjustment of any "property, debts, liabilities, or financial relations, may provide "for the transfer or retention of any property, debts, and "liabilities, with or without any conditions, and for the joint "use of any property, and for the transfer of any duties, and "for payment by either party to the agreement in respect of "property, debts, duties and liabilities so transferred or "retained, or of such joint user, and in respect of the salary, re- "muneration, or compensation payable to any officer or person, "and that either by way of a capital sum, or of a terminable "annuity for a period not exceeding that allowed by the com- "missioners under this Act or the Local Government Board.

"(2.) In default of an agreement as to any matter requiring "adjustment for the purpose of this Act, or any matter which, "in case of difference, is to be referred to arbitration, then, if "no other mode of making such adjustment or determining "such difference is provided by this Act, such adjustment or "difference may be made or determined by an arbitrator "appointed by the parties, or in case of difference as to the "appointment, appointed by the Local Government Board."

4.—(i.) By the Local Government (Adjustments) Act, 1913, it is provided :

"1. (1.) On any adjustment under . . . . section sixty-two "of the Local Government Act, 1888 . . . .—

"(*a*) . . . .

"(*b*) Provision shall be made for the payment to any "authority of such sum as seems equitable in accordance "with the Rules contained in Part II. of the Schedule to this

"Act, in respect of any increase of burden which will "properly be thrown on the ratepayers of the area of that "authority in meeting the cost incurred by that authority "in the execution of any of their powers and duties as a "consequence of any alteration of boundaries or other "change in relation to which the adjustment takes place.

"(2.) This section shall apply to any adjustment made "(otherwise than by agreement) under any of the said sections "thirty-two and sixty-two of the Local Government Act, "1888. . . . ."

(ii.) The Rules in Part II. of the Schedule are as follows:—

"(1.) Regard shall be had to—

"(*a*) The difference between the burden on the ratepayers "which will properly be incurred by the authority in meeting "the cost of executing any of their powers and duties and "the burden on the ratepayers which would properly have "been incurred by the authority in meeting such cost had "no alteration of boundaries or other change taken place;

"(*b*) The length of time during which the increase of "burden may be expected to continue:

"Provided that no alteration of income in consequence of "an apportionment under Part I. of the Schedule shall be "taken into account.

"(2.) The sum payable to any authority in respect of the "increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the "instalments or annuity shall not exceed, the average annual "increase of burden multiplied by fifteen.

"(3.) Any sum payable in respect of the cost of the maintenance of main roads shall be payable by way of annuity."

(iii.) For the said multiple of fifteen s. 5 of the Local Government (County Boroughs and Adjustments) Act, 1926, substituted the multiple of twenty-one so far as the increase is attributable to the cost of maintenance of roads.

5. Sect. 62 of the Act of 1888 was repealed by s. 307 of the Local Government Act, 1933, but is substantially re-enacted by s. 151 thereof.

6. The said provisions of the Act of 1913 were repealed by

s. 307 of the Local Government Act, 1933, except as therein mentioned, but the rules aforesaid are substantially re-enacted by s. 152 and Sch. 5 thereof and applied to adjustments under the Act of 1888.

7. An increase of burden was thrown upon the ratepayers of the said rural district councils, in the execution of their powers and duties as a road authority, in consequence of the said extension, and upon the ratepayers in the area of the Woodstock board of guardians, in the exercise of their functions as poor law authority, in consequence of the transfer to the Headington union of the areas referred to in para. 2 hereof.

. . . .

9. On April 1, 1930, by virtue of the Local Government Act, 1929, the said rural district councils and all the other rural district councils in the county ceased to be highway authorities and the roads in all such rural districts which had hitherto been maintainable by the rural district councils thereof became maintainable by the county council, and the cost thereof became payable by the county council and therefore chargeable upon the county ratepayers.

10. By s. 117 of the Act of 1929 provision is made whereby the road property and liabilities of a rural district council are transferred to and vest in the county council, and sub-s. 4 provides :—

"So much of any sum paid or payable to a district council "under the Local Government (Adjustments) Act, 1913, or "otherwise by way of adjustment on alteration of boundaries "or other change, as represents compensation to the council "in respect of the increase of the burden on the ratepayers "in meeting the cost incurred by that council in the execution "of their functions in respect of roads to which this section "applies and has not, on the appointed day, been exhausted "or applied in or towards the discharge of liabilities transferred "to the county council under this section or which would "have been so transferred if undischarged, shall, in the case "of a sum paid or payable to the district council by another "district council within the county, be repaid to that council, "and in any other case be paid to the county council.

"The sum payable by a district council to another council "under this subsection shall be of such amount as may be "agreed between those councils, or, in default of agreement, "determined by an arbitrator appointed by the Minister, and "shall be paid either by a single payment or by annual instal-"ments, as may be determined by agreement between the "councils or by such arbitrator as aforesaid, and if paid by "a single payment, the payment shall be a purpose for which "the district council may borrow under the Public Health "Acts, 1875 to 1926.

"For the purposes of this subsection, unless the arbitrator, "for special reasons otherwise determines, a sum paid to a "district council by way of such adjustment as aforesaid shall "be deemed to be exhausted at the expiration of a period of "twenty years from the date on which the alteration of boun-"daries or other change took effect, and if the sum was payable "by instalments one-twentieth part shall be deemed to have "been paid to the council in respect of each year during that "period."

11. Further, by virtue of Part I. of the Act of 1929, the Woodstock board of guardians and the Headington board of guardians and all other boards of guardians in the city and in the county of Oxford as poor law authorities ceased to exist. The functions of the Woodstock board of guardians were transferred to the county council and the functions of the Headington board of guardians were transferred partly to the county council and partly to the city council, the county council becoming responsible for the area of the county as reduced and the city council for the area of the city as extended by the Act of 1928. The functions of all other boards of guardians whose unions or parts thereof were situate within the county as reduced were transferred to the county council.

12. By s. 113, sub-s. 1, of the Act of 1929, it is provided as follows:—

"(1.) Subject to the provisions of this Part of this Act "with respect to property and liabilities for which special "provision is made, any property and liabilities held or "incurred by or on behalf of a poor law authority whose area "is wholly comprised within one county or county borough "shall on the appointed day by virtue of this section be "transferred to, and vest in, the council of the county or "county borough."

By sub-s. 2 of s. 113 provision was made for the transfer, apportionment and adjustment of the property and liabilities of a poor law authority whose area was not wholly comprised within one county or county borough.

13. Claims for financial assistance were made upon the Oxford City Council by the Headington rural council, and by the Woodstock rural council, in respect of estimated increases of annual burden in regard to the maintenance of roads: and in April, 1931 (the Woodstock board of guardians and the Headington board of guardians having ceased to exist) a claim was made against the city council by the county council as successors to the guardians of the poor of the Woodstock union in respect of an estimated increase of annual burden in regard to public assistance owing to the loss of the areas referred to in para. 2 hereof.

14. The aforesaid claims were suspended pending the decision of *Godstone Rural District Council* v. *Croydon Corporation* (1) in the Court of Appeal on July 22, 1932.

15. As a result of that decision the claims of the rural councils for compensation for increased burden in respect of roads were limited to the period between April 1, 1929, and April 1, 1930, and were settled on that basis, the amount of the annual burden having been agreed in the case of the Headington rural district council at 1925*l.* and in the case of the Woodstock rural district council at 650*l.*

16. On March 14, 1934, an agreement was reached between the parties hereto whereby the city council agreed to pay and paid to the county council the sum of 195,000*l.* in full settlement of all claims: "Save and except such claims "(if any) as the county council may be entitled to make for "increase of burden as from April 1, 1930, in respect of "(A) the maintenance of roads transferred to the county "council from district councils by the Local Government Act,

(1) (1932) 96 J. P. 363; 48 Times L. R. 649.

"1929, and (B) the administration of public assistance."

17. On May 9, 1935, a claim was made by the county council upon the city council in respect of the said matters as follows :—

(A) In respect of increase of burden on county ratepayers in meeting the cost of maintenance and improvement of roads vested in the county council under the provisions of the Local Government Act, 1929.

	£
Estimated average annual increase of burden .	5,850
Capitalized at twenty years' purchase . . .	117,000
Capital sum claimed from the city council . .	117,000

(B) In respect of increase of burden on county ratepayers in meeting the cost of public assistance.

	£
Estimated average annual increase of burden .	7,725
Capitalized at fourteen years' purchase . .	108,150
Capital sum claimed from the city council . .	108,150

And on both these capital sums interest was claimed at 5 per cent. per annum from April 1, 1930, to date of payment.

18. The city council having refused to admit the said claim, on June 3, 1935, L. L. Macassey, Esq., K.C., was appointed by agreement between the parties arbitrator concerning the same.

19. On October 17, 1935, at a preliminary hearing in this arbitration it was agreed between the parties that he should state this case for the decision of the Court upon the following question :—

II.—The legal question upon which the decision of the Court was desired was whether (as arbitrator) in considering what would be the future burden on county ratepayers he was to make provision for :

(A) The difference (if any) between the burden on the ratepayers of the county which would properly be incurred by the county council in meeting the cost of executing their powers and duties in respect of roads transferred to them by the Local Government Act, 1929, and the burden on the ratepayers which would properly have been incurred by the county council in meeting such cost had the alteration of boundaries made by the Oxford Extension Act, 1928, not taken place ;

(B) Or, alternatively, the increase of burden, if any, which would have been thrown upon the ratepayers lately in the rural districts of Headington and Woodstock after April 1, 1930, by reason of the said extension and for which the rural district councils would have obtained compensation if their functions as highway authorities had not been transferred to the county council under the Act of 1929;

(C) The difference (if any) between the burden on the ratepayers of the county which would properly be incurred by the county council in meeting the cost of executing their powers and duties in respect of the administration of public assistance and the burden on the said ratepayers which would properly have been incurred by them in meeting such cost had the said alteration of boundaries not taken place;

(D) Or alternatively the increase of burden, if any, which would have been thrown upon the ratepayers lately in the area of the Woodstock board of guardians after April 1, 1930, by reason of the transfer of parts of parishes to the Headington union had not the boards of guardians ceased to exist under the provisions of s. 1 of the Act of 1929.

III.—It was contended on behalf of the county council:

(1.) That in the adjustment under s. 62 of the Local Government Act, 1888, which had become necessary in consequence of the Oxford Extension Act, 1928, provision had to be made for the payment to the county council of such a sum as seemed to the arbitrator equitable in accordance with the Rules contained in Part II. of the Local Government (Adjustments) Act, 1913, in respect of any increase of burden which would properly be thrown on the ratepayers of the county in the execution of the county council's powers and duties as highway authority and/or in the matter of public assistance in consequence of the alteration of boundaries made by the Act of 1928.

(2.) That if in fact any difference could be shown between the burden on the said ratepayers which would properly be incurred by the county council in meeting the cost of maintenance of roads and/or in the matter of public assistance and the burden upon them which would properly have been incurred by the county council in meeting such cost had the alteration of boundaries not taken place, that difference was one for which the arbitrator was bound to provide.

(3.) That any increase of burden arrived at in manner set out in (2.) of these contentions was an increase of burden thrown upon the said ratepayers as a consequence of the alteration of boundaries.

(4.) That the arbitrator was at liberty to take into account matters which would not have been available had the adjustment or arbitration been concluded prior to the passing of the Act of 1929—namely, the transfer of the burden of the maintenance of roads from the rural district councils and of the poor law functions of the Woodstock board of guardians to the county council.

(5.) That as regards the claim in respect of road maintenance, if the adjustment between the rural councils and the city council had been made before the passing of the 1929 Act the amounts included in the compensation to the rural district councils in respect of the increase of burden on the ratepayers of the rural districts so far as it related to the period after the powers and duties of the rural district councils were transferred to the county council would have been paid to that council under the provisions of s. 117, sub-s. 4, of that Act.

(6.) That as regards the claim in respect of poor law functions, if the adjustment between the Woodstock and Headington boards of guardians had been made before the passing of the 1929 Act, the amount of compensation to the Woodstock board of guardians in respect of the increase of burden on the ratepayers in their area, so far as it formed part of their property at April 1, 1930, would have been transferred to and vested in the county council under s. 113 of that Act.

(7.) That if on the other hand the extension had taken place on or after April, 1930, the city council would be liable to pay to the county council a sum arrived at in manner set out in (2.) of these contentions.

(8.) That, unless the contentions of the county council were correct, alterations of boundaries brought about so shortly before April 1, 1930, that it was impossible to complete the

C. A.
1938

Oxfordshire County Council v. Oxford City Council.

adjustment before that date would not (like all other alteration of boundaries) carry with it the obligation to compensate ratepayers injuriously affected.

(9.) That if the above contentions (I.) to (4.) failed the county council ought to receive the same amount as they would have received from the rural councils and from the Woodstock board of guardians had the adjustment between these authorities and the city council been concluded before the Act of 1929 was passed and without taking account of that Act and that the arbitrator ought to provide for such amount.

IV.—The city council disputed each of the contentions of the county council with the exception of that numbered (4.). They also contended—

(I.) That the powers and duties referred to in s. I of the Local Government (Adjustments) Act, 1913, and the rules in Part II. of the Schedule thereto were conferred or imposed on the authority by subsequent legislation.

(2.) That any increase in the burden on the ratepayers of the county in the matter of roads vested in the county council under the Act of 1929 or in the matter of public assistance was not a consequence of the Act of 1928, but of the Act of 1929.

(3.) That the Act of 1929 made no provision for compensation for increased burden resulting to any authority or ratepayers as a consequence of its provisions.

V.—The question for the Court was: Whether or not the arbitrator ought in determining the sum, if any, to be paid in respect of increase of burden on the ratepayers of the county of Oxford, to have regard to any and which of the matters set out in para. II. (A), (B), (C) and (D) hereof.

Annexed to the special case was a print of the submission to arbitration, from which it appeared that the arbitrator was appointed under either s. 33 or s. 61 of the Act of 1928 to determine what adjustments should be made between the county council and the city council in consequence of the alteration of the city boundaries by the Act of 1928.

On May 24, 1937, the Divisional Court gave judgment answering the questions submitted to it in and by the special case in the negative by declaring that regard should not be had to any of the matters set out in para. II. of the special case.

The Oxfordshire County Council gave notice of appeal dated June 7, 1937, for an order that the judgment of the Divisional Court might be rescinded, and that it might be ordered that the said question be answered in the affirmative —namely, that regard should be had to the matters set out in sub-paras. (A) and (C) in the said paragraph, or alternatively to the matters set out in sub-paras. (B) and (D) thereof.

R. M. Montgomery K.C. and *Cope Morgan* for the Oxfordshire County Council, appellants. The Divisional Court were wrong in holding that the arbitrator, who was appointed with a view to the adjustment of financial relations between the city and county of Oxford necessitated by the alteration of the boundary between them by the Oxford Extension Act, 1928, in considering the future burden on the county ratepayers resulting from the transfer to the county council by the Act of 1929 of the duties of the maintenance of district roads and the administration of public assistance, should not make provision for such increase in that burden as might be found to be a consequence of the alteration of the boundaries by the Act of 1928. It is submitted that questions (A) and (C), or alternatively, questions (C) and (D) in para. 19 of the special case should be answered in the affirmative. Provision for financial adjustment in such a case as this is made by the Local Government Act, 1888, ss. 32 and 62, by the Local Government (Adjustments) Act, 1913, s. 1, sub-s. 1 (*b*), and sub-s. 2, and the Rules in Part II. of the Schedule to that Act, and by ss. 33 and 61 of the Act of 1928, all which provisions are set out in the special case; and it was for the purpose of making an adjustment under these provisions that the arbitrator was appointed in the present case. First, the arbitrator should make provision for such increased burden on the county ratepayers resulting from the transfer to the county council by the Act of 1929 of the district roads, as he may find to be a consequence of the alteration of boundaries

C. A.
1938

OXFORDSHIRE COUNTY COUNCIL v. OXFORD CITY COUNCIL.

by the Act of 1928. A burden in respect of the maintenance of district roads has no doubt been imposed upon the county ratepayers by virtue of the Act of 1929, but that burden would not have been so heavy as it is had it not been for the transfer of beneficial areas from the county to the city by the previous Act of 1928, and that increased burden has been brought about not by the Act of 1929 but by the Act of 1928. It is immaterial that the Act of 1929 did not come into operation until after the boundaries had been adjusted by the earlier Act of 1928. An arbitrator is entitled and bound to take into account all relevant facts which he knows to be in existence at the time when he is conducting the arbitration: *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* v. *Pontypridd Waterworks Co.* (1) and *Godstone Rural Council* v. *Croydon Corporation.* (2) Before this arbitration took place the Act of 1929 had already placed upon the county council the duty of maintaining the district roads, and the arbitrator should have had regard to that fact when considering how far the Act of 1928 by altering the boundaries had increased the financial burden on the ratepayers of the county. Of the capital sum representing the increase of burden in respect of these roads the district councils are entitled to 1/21 for the year ending April 1, 1930, and the county council are entitled to the balance of 20/21 thereof. See the Act of 1929, s. 117, sub-s. 4. In the case of *Godstone Rural Council* v. *Croydon Corporation* (2) it was held that an arbitrator determining the compensation to be paid by a county borough to a rural district in respect of the increase of burden on the ratepayers of that district in consequence of the transfer of a parish from that district to the borough must have regard to the Act of 1929, under which the county council became the road authority; but as the county council was not a party to that case the question of its rights was not there expressly determined. It is submitted, however, that in principle that case is decisive of the present case in favour of the county council. Next, the arbitrator should make provision for such increased burden on the county ratepayers resulting from the transfer from the poor law authorities to the county council by the Act of 1929 of the administration of public assistance as may be a consequence of the alteration of boundaries by the Act of 1928. The argument applied in regard to the district roads is also applicable here. Question (D) in para. 19 of the special case may properly be answered in the affirmative. There was transferred to the county council the right to make a claim which the Woodstock union had against the Headington union in Oxford city. That was a chose in action and therefore "property" as defined by s. 134 of the Act of 1929 and so within s. 113 of that Act.

---

(1) [1903] A. C. 426.

(2) 96 J. P. 271 and 363.

Maurice FitzGerald K.C. and *R. D. Stewart-Brown* (*Hon. Sir Stafford Cripps K.C.* with them) for the Oxford City Council, respondents. The city council are under no statutory or other liability to pay the sums claimed by the county council in respect of roads or public assistance, and the arbitrator in making the adjustment need not make any provision for these sums. The county council is only entitled to compensation from the city council for loss sustained by reason of and at the time of the coming into force of the Oxford Extension Act, 1928, and not for loss subsequently sustained. Sect. 33, sub-s. 3, of that Act provides that in the absence of agreement for equitable adjustment on alteration of areas the provisions of the Local Government Act, 1888, shall apply. Sect. 62 of the Act of 1888 as thus brought into the Act of 1928 only applies to the authorities affected by the Act of 1928, and not to authorities which are not affected by that Act, such as poor law authorities or rural councils as road authorities. The word "income" in that section means income existing at the date of the transfer of the property from the one authority to the other and not income subsequently lost, and that section does not provide for compensation for the absence of such future profits: *Caterham Urban Council* v. *Godstone Rural Council.* (1) The Local Government (Adjustments) Act, 1913, s. 1, sub-s. 1 (*b*), provides that on any adjustment under s. 62 of the Act of 1888 provision

---

(1) [1904] A. C. 171.

OXFORDSHIRE COUNTY COUNCIL *v.* OXFORD CITY COUNCIL.

shall be made as therein stated, and under that clause the authority claiming the compensation must prove that an increase of burden will be thrown upon the ratepayers as a consequence of the alteration of boundaries, that is in the present case by the Act of 1888. By the Rules in the Act of 1913, Schedule, Part II. (1.) (*a*), it is no doubt provided that in making the adjustment, regard shall be had to the difference between the burden on the ratepayers which will properly be incurred by the authority in meeting the cost of executing any of their powers and duties, but these did not include the maintenance of district roads and the provision of public assistance when the Act of 1928 came into force. The increase of burden on the ratepayers can only be measured by the increase of poundage in the rate: *Queenborough Corporation* v. *Sheppey Rural Council.* (1) There can be no increase of burden on the ratepayers until a rate has been levied: *Godstone Rural District Council* v. *Croydon Corporation.* (2) In the present case the increase of burden, if any, upon the county ratepayers in respect of roads and public assistance is a consequence not of the extension of the city boundaries by the Act of 1928, but of the alteration of the law effected by the Act of 1929 in making the county council the district road and poor law authority. The transfer of a beneficial area from a rural district to a city may prove expensive for the city, which has to provide for urban services. The Act of 1929 transferred burdens from other districts to the county without providing for compensation, but at the same time it reorganized and increased the Government grants to local authorities, thus changing the basis of contributions to local government expenses. If the contention of the appellants is sustained that the arbitrator, in considering what would be the future burden on the ratepayers of the county in consequence of the alteration of boundaries by the Act of 1928, must make provision for the effect of the Act of 1929, arbitrations of this kind would become practically impossible, inasmuch as the arbitrator would have to provide for the effect of all legislation affecting

(1) [1915] 1 K. B. 356.

(2) 96 J. P. 363.

the ratepayers between the date of the alteration of boundaries and the date of his award. The arbitrator, in considering what would be the future burden on the ratepayers of the county, was not bound to make provision for either of the differences mentioned in the case in para. II. (A) and (C) respectively, or for either of the increases of burden mentioned in para. II. (B) and (D).

Montgomery K.C. replied.

1938. March 7. The following judgments were read :—

GREER L.J. This is an appeal from the decision of the Divisional Court of the King's Bench Division on questions asked by an arbitrator appointed to adjust certain financial relations that required adjustment by reason of the extension of the boundaries of the City of Oxford so as to include part of the area of the County of Oxford. The Divisional Court answered the questions in favour of the city without giving any reasons for their decision. The question in the appeal is whether the order of the Divisional Court was right or not. The questions which the Divisional Court were asked to answer were stated in a consultative case, not in an award in the form of a special case. There had been a well established practice of the Divisional Court when there was no appeal from their decisions, answering questions stated on a consultative case, to answer the questions put to the Court in the affirmative or the negative without stating their reasons. I doubt whether this practice ought to be followed now that a right of appeal has been established by law from the decisions of the Divisional Court to the Court of Appeal; but, be that as it may with regard to proceedings in the Divisional Court, we are satisfied that on appeal reasons ought to be stated as they would be and have been in cases where an arbitrator has made his award in the form of a special case.

In order to decide this appeal we have to consider the effect of several statutes and of the decisions thereon. Provision was made in the Local Government Act, 1888, for adjustments of property, debts, and liabilities as between counties and boroughs, when the boroughs were extended so as to take in a part of the county. In 1894 it was decided by the House of Lords in the case of *Caterham Urban District Council* v. *Godstone Rural District Council* (1) that the Local Government Act, 1888, did not give an arbitrator power when he was making an adjustment under the Act of 1888 to take into account the loss to the ratepayers occasioned by taking from a rural district council a valuable rateable area. This was considered to operate unjustly in favour of the ratepayers of the council whose district was extended and against the ratepayers of the rural district council who had been deprived of part of their area, and in 1913 the Local Government (Adjustments) Act, 1913, was passed to remedy this injustice. That Act provided by s. 1 (*b*) that on any adjustment under s. 32 or under s. 62 of the Local Government Act, 1888, or under s. 68 of the Local Government Act, 1894, provision should be made for the payment to any authority of such sum as seemed equitable in accordance with the rules contained in Part II. of the Schedule to that Act, in respect of any increase of burden which would properly be thrown on the ratepayers of the area of that authority in meeting the cost incurred by that authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place. In Part II. of the Schedule it was provided that regard should be had to (*a*) the difference between the burden on the ratepayers which will properly be incurred by the authority in meeting the cost of executing any of their powers and duties and the burden on the ratepayers which would properly have been incurred by the authority in meeting such cost had no alteration of boundaries or other change taken place, and (*b*) the length of time during which the increase of burden may be expected to continue. It is specially to be noted that the statute is concerned not with any increase of burden on the authority, but on the ratepayers of the area of the authority from whose district part of the rateable value has been taken.

(1) [1904] A. C. 171.

On August 3, 1928, a private Act of Parliament, called the Oxford Extension Act, 1928, was passed. This Act provided for the inclusion in the city of Oxford of certain parts of the adjoining districts then within the area of certain rural and urban districts. The Act was to come into force on the appointed day, which was April 1, 1929.

By the Local Government Act, 1929, the liability to repair roads which had formerly rested on the said rural and urban councils, and the liability formerly resting on the guardians to provide for the poor of their districts, was transferred to county councils. This Act came into operation exactly one year after the Oxford Extension Act, 1928—namely, on April 1, 1930. A claim was then made by the county council with regard to the loss which they alleged was occasioned to the ratepayers of the county council by reason of the extension of the borough of Oxford, which had the effect of improving the rateable area of the city council and increasing the burden on the ratepayers in the county, and Sir Lynden Macassey was duly appointed to make all the proper adjustments under the Act of 1888, as modified by the Act of 1913. The arbitrator was asked to state a consultative case, and he did so stating four questions, which are set out in para. II. of the case, on which he desired the opinion of the Court.

Thereafter a claim was made by the rural district council of Godstone against the Croydon Corporation (1) in respect of the loss their ratepayers had suffered by reason of the extension of the borough of Croydon. This claim came in the first instance before Roche J. (now Lord Roche) on an award stated in the form of a special case, and afterwards on appeal before the Court of Appeal. As stated in the headnote, it was held by Roche J. as follows: "(1.) that in "determining, in 1932, the amount to be paid to the rural "district council by the corporation in respect of the increase "of burden thrown on the ratepayers of the rural council in "meeting the cost of maintenance of roads in the rural district "in consequence of the transfer of the parish from the rural

(1) See *Godstone Rural District Council* v. *Croydon Corporation,* 96 J. P. 271, 363.

"district to the county borough, the arbitrator must take "into account the passing and coming into effect of the Local "Government Act, 1929, under which the county council "became on April 1, 1930, the highway authority; (2.) that "in determining the amount no compensation should be "given for any period after April 1, 1930." The decision of Roche J. was confirmed in the Court of Appeal. In the course of his judgment Scrutton L.J. used these words: "I do wish to say that the Surrey County Council are not "parties here, and that nothing that I say is binding on them, "but if the parties had chosen to take what I should have "thought was the sensible course, namely, to get the three "people together, the Surrey County Council, the Croydon "Corporation and the Godstone rural district council, and "had agreed that Sir Lynden Macassey should decide the "matter once and for all between them it would have saved "a great deal of costs and delay. They have not chosen to "do that and all I can say is that I am not deciding anything "about the liabilities of the Surrey County Council." It seems to me that in this part of his judgment the learned Lord Justice thought that the Surrey County Council were entitled to have some say in the question as to whether their ratepayers should have relief in respect of the loss which their ratepayers had suffered by reason of the joint effect of the Extension Act and the Act of 1929, otherwise there would have been no reason to say that the matter should have been dealt with by some arrangement to which the Surrey County Council would be a party; but he expressly refrained from deciding the point, as the county council were not parties to the appeal.

In the present case the district councils whose ratepayers for one year lost the advantages they would have had if their districts had not been transferred to the Oxford City Council have been paid and have accepted a sum of money in satisfaction of the amount due for the year in which they suffered the loss, and no question arose in the arbitration between the county council and the city council with regard to the loss incurred during the year in question by the ratepayers of the county then under the jurisdiction of district councils; but the Oxford County Council made a claim to have the loss of their ratepayers, which they said was the consequence of the Oxford Extension Act, 1928, considered by the arbitrator when he came to make the necessary adjustments between county and city. The question involved in the appeal is whether the decision of the Divisional Court, which would have the result of depriving them of that compensation, was right or not. By the Act of 1913 the limit was made fifteen years, but this was afterwards altered to twenty-one years in respect of roads, but with regard to poor rate it remained at fifteen years. Accordingly, the claim of the county council was based on twenty years in respect of the roads inasmuch as compensation had already been paid in respect of one year to the district councils, and they claimed in respect of fourteen years for the loss occasioned by their having to pay poor rates for the reduced area of the council. The question we have to determine is whether the loss to the county council can be properly called a consequence of the Extension Act. I think it can be said to be a result of the Extension Act, notwithstanding the fact that no such consequence to the ratepayers in the area of the county council would have followed but for the passing of the Act of 1929. Assume for the purpose of this appeal that the arbitrator may find when he comes to adjust the figures that the ratepayers in the area of the county council have incurred a loss, the amount of which he will determine, by reason of the ratepayers in their area having had their burdens increased through the taking away of some portion of their area where there was great rateable value and having left on them the burden of the upkeep of the secondary roads in their county and the maintenance of the poor without the assistance which, but for the extension, they would have obtained in the rateable areas taken from them, it seems to me that such added burden can rightly be said to be a consequence of the extension of the boundaries of the city of Oxford. Any other view would leave the ratepayers in the county without the relief which I think they would be entitled to by reason of the provisions of the Act of 1913, and would give an advantage to the ratepayers of the city which they have received by reason of the extension.

For these reasons, I think the answer which we should give to the legal question propounded in para. II. of the case is that the ratepayers of the county are entitled to have an adjustment made by the arbitrator which will compensate them for the added burden of increased rates due to the taking from the county of a valuable rateable area. I think the answer of the Court should be that the county council are entitled to have the arbitrator consider the question stated in clauses (A) and (C) of para. II. of the case. In my judgment, the county council will be entitled when the arbitrator is making his adjustment to allege and prove that the ratepayers of the county have suffered an increase of burden in the rates they have to pay to the county council as a consequence of the alteration of the boundaries effected by the Oxford Extension Act. It seems to me that this is a logical result of the decision in the *Godstone* v. *Croydon* case. (1) In that case it was decided that the arbitrator was in law bound to hold that he could not consider any loss to the ratepayers under the jurisdiction of the Godstone district council for any period beyond the two years during which they remained under the jurisdiction of that district council. In my judgment, if that case is to be regarded as correctly stating the ratio decidendi, as I think it does, it means that in making the adjustment the arbitrator has to ask himself the question : " Has the district council established that "their ratepayers have suffered any loss beyond the two "years during which some of their ratepayers remained "under the jurisdiction of the area of the district council ? " It seems to me logically to follow that when the arbitrator comes to make his adjustment between the county council and the city council he must ask himself the question : " Has "the county council established to my satisfaction that their "ratepayers will suffer a loss through the increased rates "they will have to pay as a consequence of the Oxford

(1) 96 J. P. 271, 363.

"Extension Act ?" and if he finds that the county ratepayers have in fact suffered such a loss, he will have to make an adjustment providing for a sum to be paid to the county council as compensation to their ratepayers for the loss so sustained.

For these reasons, in my judgment, the appeal should be allowed with costs here and below, and the answer of the Court to the arbitrator should be that in the adjustment he will make he should act on the opinion of this Court that he will be entitled to make provision for the differences, if any, stated in clauses (A) and (C) of para. II. of the case.

MACKINNON L.J. This is an appeal from the Divisional Court on a special case stated by an arbitrator for the opinion of that. Court. The Divisional Court contented itself by answering "No" to the question put by the arbitrator, without giving any reasons for that conclusion. Since the case involves the examination of a peculiarly repulsive set of enactments, I should be glad if I might say that in my opinion the answer to the arbitrator's question ought to be "Yes," and that leave to appeal to the House of Lords should be given. But I think it is my duty to resist that temptation.

By the Oxford Extension Act, 1928, its provisions were to take effect as from the appointed day, which was April 1, 1929. By s. 4 of that Act certain areas previously outside the city (for example, part of the Headington rural district) were transferred within the city. This meant that rateable hereditaments in the transferred portion of the rural district would henceforth pay their rates to the city. They had, of course, previously paid rates on a demand note from the Headington rural district council, which would be a general rate including (*a*) the rate recoverable by the county council in respect of county council services, such as main roads, county police, and education (this being collected in the general rate by virtue of a precept from the county council to the rural district council); and (*b*) the rate required by the rural district council itself in respect of services such as the upkeep of minor roads, sanitation, etc., entrusted to the rural district council.

C. A.
1938
Oxfordshire County Council v. Oxford City Council.
MacKinnon L.J.

Sect. 33 of the Oxford Extension Act, 1928, provides for the adjustment of financial relations between the city and the county, and makes s. 62 of the Local Government Act, 1888, apply. And s. 61 also refers to s. 62 of the Act of 1888. For some mysterious reason s. 33 also refers to "any other "county borough," when no other county borough can conceivably be involved. I can only suppose that the draftsman was determined to leave no stone unturned in his quest for obscurity.

One result of the transfer of part of a rural area to an urban area may be to impose on the ratepayers remaining in the diminished rural area an added burden. The part transferred, being on the outskirts of a growing town, is likely to be more densely covered by rateable hereditaments than the more remote and more rural remainder. The rates previously collected in that transferred area may have been profitable to the county council and the rural district council in the sense that they have been more than sufficient (for example, by 1000*l.*) to pay for the services rendered in that area by the county council and the rural district council respectively. It has, in fact, been what has been called in some cases "a beneficial area." When such a beneficial area has been transferred to an urban area, the remaining ratepayers in the part of the rural area not transferred may have to pay rates on a higher scale than before; for there will be no longer available to the county council and the rural district council, for the discharge of their duties in the diminished area, the surplus of the rates previously accruing to them from the transferred area over and above the cost of those services in the transferred area.

It was at one time thought that this added burden on the ratepayers of the untransferred part of the rural area could be recovered from the authority of the urban area, on behalf of such ratepayers, by the rural district council or the county council, under s. 62 of the Local Government Act, 1888. That this was an erroneous view was decided by the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council.* (1) And this decision was repeated, and

(1) [1904] A. C. 171.

emphasized, in *West Hartlepool* v. *County of Durham.* (1) The result of those decisions was that in such a case the surviving ratepayers of the rural area were without relief from the extra burden added to their shoulders through the transfer of their former, and more opulent, brother ratepayers to the urban area. It was obviously in order to give them such relief, and to counteract the effect of these decisions, that Parliament enacted the Local Government (Adjustments) Act, 1913, by way of amendment to s. 62 of the Local Government Act, 1888. [His Lordship read the provisions of the Act of 1913 which are set out above in the special case, ante pp. 418, 419.]

It is, I think, of importance to observe, and keep firmly in mind, that the compensation to be claimed by one authority from another, pursuant to this Act of 1913, is in respect of the burden on its ratepayers. The object is the benefit or relief of those ratepayers, by counteracting the increase of rates that might otherwise be imposed on them. But there is no conception, at any rate not directly, of the authorities as income receiving bodies, one of whom, by the transfer, has had its income increased, while the other has had its income diminished, and of the latter authority being therefore compensated by the former.

The special case in para. 7 finds as a fact that "an "increase of burden was thrown on the ratepayers of the "said rural districts in meeting the cost incurred by the "said rural district councils in the execution of their powers "and duties as a road authority in consequence of the said "extension" of the city. This refers to one of the specific matters (the cost of road maintenance) in dispute in this case. But it was stated by counsel, and agreed, that this means that by reason of part of, for example, the Headington rural district being transferred to the city there was an added burden on the remaining ratepayers of the Headington rural district because of the transfer to the city of a beneficial area. That increased burden of rates would be (*a*) in respect of the county rate, for education, county police, main roads,

(1) [1907] A. C. 246.

C. A.
1938

Oxfordshire County Council v. Oxford City Council.

MacKinnon L.J.

etc., and (*b*) in respect of the rural district part of the general rate for rural district services, including such road maintenance as was the duty of the rural district council.

It was further stated, and agreed, that the city has conceded that, pursuant to the Act of 1913, it must pay to the county council, in respect of this added burden on their ratepayers for such things as education, county roads, etc. And the city concedes that it must pay to the rural district council, in respect of the added burden on its ratepayers for rural district services, so far as those services existed as a duty of the rural district council on April 1, 1929, the date when the Oxford Extension Act, 1928, took effect.

But the particular dispute as to the extra burden on the ratepayers in respect of the cost of road maintenance arises from another outbreak of legislative activity. The Local Government Act, 1929, received the Royal Assent on March 27, 1929, four days before the Oxford Extension Act, 1928, began to operate. By s. 30 of this Act the duty of maintaining roads previously discharged by a rural district council was transferred, as from the appointed day, to the county council. And by s. 160 the appointed day means April 1, 1930, one year after the appointed day under the Oxford Extension Act, 1928.

The city, in these circumstances, say in effect: "We "agree that, if the Local Government Act, 1929, had not "been passed, we should, under the Act of 1913, have been "liable to pay to the rural district council, in respect of the "added burden on its ratepayers for road maintenance, and "by a calculation not exceeding twenty-one years of that "added burden. But as the rural district council has only "had to discharge the duty of road maintenance for one year, "we are only liable to pay for that one year. The county "council, having taken over that duty, claims that it can "recover from us for the remaining twenty years. That we "are not liable to pay. The burden on the county council is "not a result of our Oxford Extension Act, but is only a "result of the Local Government Act, 1929."

That this properly represents the position taken up by the

C. A.
1938

OXFORDSHIRE COUNTY COUNCIL v. OXFORD CITY COUNCIL.

MacKinnon L.J.

city is, I think, apparent, if one refers to the second contention of the city as set out in para. 19 (IV.) of the special case: "That any increase in the burden on the ratepayers "of the county in the matter of roads vested in the county "council under the Local Government Act, 1929, or in the "matter of public assistance is not a consequence of the "Oxford Extension Act, 1928, but of the Local Government "Act, 1929." So far as concerns the manifest intention of the Act of 1913, I think this argument is based on the fallacy which I mentioned earlier, in order to deprecate its intrusion. It rests upon a notion of the county council and the city council being income receiving entities, with certain duties to pay for out of their income. Hence the insistence that the burden of maintaining these roads was imposed on the county council by the Act of 1929.

But what we are really concerned with is the added burden on the ratepayers occupying rateable hereditaments in the rural area. Part of the rate they have to pay is for road maintenance. By reason of the Oxford Extension Act, as is found, the burden of that was increased through the loss of the beneficial area. In 1929 the maintenance of the roads, for which this part of the general rate was levied, was done by the rural district council. In 1930 that maintenance was handed over to the county council. But the rate, and that portion of it required for road maintenance, would remain the same, with the possible difference that in 1930 the proportion of the general rate levied by the rural district council, under the precept of the county council, will have been a little higher than in 1929, while the proportion of the general rate levied by the rural district council for their own purposes will have been a little less in 1930 than in 1929. In other words, the burden imposed on these rural ratepayers by the Oxford Extension Act is exactly the same in 1930 as it was in 1929, though the work for the payment for which they paid this particular part of the general rate was done by a different authority.

That in respect of this added burden these ratepayers should be compensated by the city seems to me the manifest purpose of the Act of 1913. Then is there anything in the wording of that Act which compels me to defeat that purpose ?

Before seeking to answer that question, I must refer to another case. The Godstone rural district council appears to be fired with a laudable ambition to elucidate the law of local government, and in 1932 they figured again in *Godstone Rural District Council* v. *Croydon Corporation.* (1) A special Croydon Act of 1927 transferred the parish of Addington from the Godstone rural district to the borough of Croydon as from April 1, 1928. Addington was a beneficial area to the rural district. In respect of the added burden on the ratepayers of the rural district for maintenance of roads, Croydon agreed to pay for the two years until April 1, 1930. But when the 1929 Act transferred the road maintenance to the Surrey county council as from April 1, 1930, Croydon refused to pay any more, as Oxford City refuses in this case. Godstone rural district council accordingly claimed to recover from Croydon in respect of the remaining nineteen of the twenty-one years, as agent or trustee for the Surrey county council ; and they relied strongly on the fact that, if their arbitration with Croydon had been promptly completed, and an award given before the passing of the 1929 Act, so that they had recovered for the twenty-one years, they would on April 1, 1930, have had to hand over the unexpended portion of the sum so received from Croydon to the county council, pursuant to s. 117, sub-s. 4, of the Act of 1929.

Roche J. held that Godstone rural district council could not make good this claim, and he was affirmed by the Court of Appeal. But both Roche J. (2) and Scrutton L.J. (3) are careful to say that they are not deciding what ought to be the result, if the claim had been made not by the Godstone rural district council but by the Surrey county council.

The present case accordingly raises the question thus reserved, and the question is whether the Oxford county council can claim from the city in respect of the added burden on their ratepayers since April 1, 1930, for road maintenance, by reason of the transfer on April 1, 1929, of part of the Headington rural district to the city, and the consequent loss of the beneficial area constituted by that part.

---

(1) 96 J. P. 271, 363.

(2) Ibid. 275.

(3) 96 J. P. 366.

I think the county council can so claim. Sect. 1, sub-s. 1 (*b*), of the Act of 1913 enacts: "Provision shall be made for "the payment to any authority . . . . in respect of any "increase of burden . . . . on the ratepayers of that "authority," etc. The county council is an authority. The county ratepayers are ratepayers of that authority. The burden on those ratepayers has been increased by the loss of the share of that burden borne before April 1, 1929, by their brethren in the transferred area. The rate, as part of the general rate, is still collected by the rural district council. The only change (no change at all to the ratepayers, and probably unknown to all of them) is that the rural district council, instead of keeping the money for their work on these roads, hands it over to the county council, which has taken over the work.

Upon the general question, therefore, propounded by the arbitrator at the end of the special case I think the answer is "Yes." But there remains a subsidiary question. Let the part of Headington rural district transferred to the city be X; let the remainder of the rural district be Y; and let the county of Oxford outside the old rural district be Z. Now the case finds that X was a beneficial area as between X and Y. In my hypothetical figure I assumed that in 1928 the rural district council collected from X 1000*l.* in rates more than they spent in X. Now that the county council are making the claim they are making it for the ratepayers of Y and Z. But as between X and Y plus Z it may be that X would be a still more beneficial area than X was to Y, for Y itself may be a beneficial area as between Y and Z. If therefore the county council had been maintaining these roads in 1928, and lost X by its transfer to the city, it may be that it would have lost 1200*l.*, instead of the 1000*l.* lost by Y. In other words, though the ratepayers of Y, having lost the benefit from their fellows in X, had to pay more for the upkeep of roads in Y, their added burden may be even greater when they have, as ratepayers of Y and Z, to pay towards the upkeep of roads in Y and Z. To the extent of this added burden (in my hypothetical figures, 200*l.*), that is, to the extent to which X would have been in 1928 a more beneficial area to Y plus Z than in fact it was to Y, I think the result is not due to the Oxford Extension Act, 1928, but is due to the Act of 1929. And to this extent, but to this extent only, I think the contention of the city that the increase of burden on the ratepayers "is not a consequence of the Oxford Extension "Act, 1928, but of the Local Government Act, 1929," is correct.

Something like this difference between the two states of things is reflected in the alternatives put in paras. (A) and (B) of section II. of the special case. What I have tried to indicate as in my view the proper basis for the calculation of compensation approximates to (B) rather than to (A). But I do not think I assent in terms to (B). I think the claim is to be made by the county council on behalf of its county ratepayers (in Y plus Z), and not on behalf of the ratepayers in Y, as in (B). But in estimating the claim for the ratepayers in Y plus Z the arbitrator ought to deduct such part of the claim, if any, as results, for the reasons I have given, not from the Oxford Extension Act, 1928, but only from the Local Government Act, 1929. The resulting figure, I imagine, will probable be very much that which would come from the formula in (B).

I am conscious that all this imposes an appalling task on the arbitrator. But as it would strain the combined intellects of Aristotle and Sir Isaac Newton to achieve an impeccable award under these enactments, this additional complication is perhaps of little moment.

So far I have discussed this matter only in relation to the claim about maintenance of roads, arising on the first half of para. 7 of the special case, and the alternatives (A) and (B) in para. 19 (II.). There remains the problem about poor law expenses under the second half of para. 7

and the alternatives (C) and (D) in para. 19 (II.). This involves an even more maddening confusion, first, by the transfer under the Act of 1928 of part of the Woodstock union to the Headington union (so that the remainder of the Woodstock area was left wholly in the county, and part of the Headington union was in the city and part in the county); and secondly, by the abolition of the guardians by the Act of 1929, and the transfer of their duties in Woodstock to the county, and of their duties in Headington partly to the city, and partly to the county.

In principle, I think, despite this added complication, the same result should follow as in the case of the roads. The Woodstock union, on behalf of its ratepayers, would have had a claim on the Headington union by reason of the transfer of the beneficial area. The discharge of the duties of the guardians in the Woodstock union and of those in the Headington union outside the city has been transferred to the county council, and those of the Headington union within the enlarged city (including the No. 2 area) to the city council. Subject to the qualification I have made as to the roads I think the county council can claim on the city council in respect of the added burden on county ratepayers resulting from the loss of the beneficial area No. 2. Therefore I think the arbitrator should make provision under his alternative (C), subject to the qualification that the increase of burden on the county ratepayers that he allows for must be limited, in the way I have tried to indicate, only to the increase caused by the Act of 1928, which I think will approximate to the result as under his alternative (D).

I think the city should pay the costs here and in the Divisional Court.

Bennett J. I would dismiss this appeal and affirm the order of the Divisional Court.

In the end the answers to the questions propounded by the learned arbitrator in the special case turn entirely, I think, upon the meaning and effect of s. 1 of the Local Government (Adjustments) Act, 1913, and the rules in Part II. of the

Schedule to that Act and upon whether those statutory provisions are capable upon their fair construction of being applied to the facts out of which the claimants' claim arises.

To maintain their contentions that the questions formulated in sub-paras. (A) and (C) of para. II. of the special case, should both be answered in the affirmative, the claimants must, I think, establish the proposition that the increase in burden on their ratepayers in respect of which they claim compensation from the respondents is a consequence of the alteration of the boundaries of the city of Oxford by the Oxford Extension Act of 1928 (to which Act I propose hereafter to refer as the Act of 1928).

The Act of 1928 severed from the areas in which the claimants, the Headington rural district council and the Woodstock rural district council respectively exercised powers, and discharged duties, parts thereof and added the severed parts to the city. The severance became effective on April 1, 1929.

Thereafter the said three authorities lost their power to levy rates upon the occupiers of the severed parts, and at the same time ceased to be under obligation to exercise or discharge powers or duties therein.

The severed parts had been profitable to the said three authorities in the sense that the sums of money which they respectively had obtained in rates from the occupiers of hereditaments therein exceeded the costs they respectively incurred in the execution therein of their powers and duties. The necessary consequence was to add to the burden of the ratepayers in the reduced areas of the said three authorities respectively the excess of the sums of money obtained before April 1, 1929, from the ratepayers of the severed parts over the costs incurred by the said three authorities in the execution in such parts of their powers and duties.

The Act of 1928 contains two sections in what I understand to be common form, the purpose of which is to enable authorities from whom areas, profitable in the sense I have indicated, had been severed to obtain compensation from the respondents, to whose area they had been added. These sections are ss. 33 and 61. [His Lordship read these sections so far as set out above in the special case, ante pp. 416, 417.]

Sect. 62 of the Local Government Act, 1888, provides, by sub-ss. 1 and 2, as follows: [His Lordship read these sub-sections which are set out above in the special case, ante p. 418.] The remaining sub-sections are not material for the present purposes.

If this had been all the legislation to be considered it would to-day be clear that neither the county council nor any other local authority who, as a result of an extension of the city boundary, had lost a profitable rating area would be entitled to any compensation from the city who had gained it; for it was decided by the House of Lords in the case of *Caterham Urban District Council* v. *Godstone Rural District Council* (1) that the loss of such an area was not a matter to be adjusted under s. 62 of the Local Government Act, 1888, and that that section did not give compensation for any such loss of profit.

This decision was contrary to what was thought to have been the meaning of s. 62 of the Act of 1888, and was considered to work harshly against some local authorities when others extended their boundaries, and so to put the matter right Parliament passed the Local Government (Adjustments) Act, 1913, the relevant provisions of which have already been read, and therefore I do not propose to read them again.

As appears from the submission to arbitration (a print of which is annexed to the special case) the learned arbitrator who has stated the special case was appointed either under s. 33 or under s. 61 of the Act of 1928 (it matters not which, and both sections are referred to in the submission) to determine what adjustments have to be made between the claimants and the respondents as a consequence of the extension of the boundaries of the city of Oxford by the Act of 1928.

The special case is divided into five paragraphs, and in para. I., which is divided into nineteen sections, are stated facts upon which the claimants and respondents are agreed.

(1) [1904] A. C. 171.

As appears from section 16 of para. I., on March 14, 1934, an agreement was reached between the claimants and the respondents, whereby the respondents agreed to pay the claimants 195,000*l.* in full settlement of all claims, save and except such claims, if any, as the claimants may be entitled to make as from April 1, 1930, in respect of (A) the maintenance of roads transferred to the county council from district councils by the Local Government Act, 1929, and (B) the administration of public assistance.

The arbitration is therefore concerned only with those two claims, and if there be any foundation for an award against the respondents in respect of them it must be found in the provisions of the Local Government (Adjustments) Act, 1913.

It was for this reason I said at the outset that I thought that to maintain their claims the claimants must establish that there had been an increase of burden upon their ratepayers as a consequence of the extension of the boundaries of the city of Oxford by the Act of 1928, since it is only in such an event that the statute enables an adjustment to be made in respect of such an increase.

I think the solution of the problem is made easier by considering separately the two claims made by the claimants, taking first their claim in respect of the increased burden upon their ratepayers in meeting the cost of public assistance.

When on April 1, 1929, the Act of 1928 came into operation neither the claimants nor the respondents were spending any money in connection with public assistance, nor were their ratepayers burdened with any rates in that connection. The powers and duties in regard to that service were executed by the boards of guardians of poor law unions, and it was the ratepayers in the areas for which they were responsible who had to bear the cost of executing the powers and duties connected with that service.

As appears from para. I., section 2, of the special case, parts of three parishes, namely Cutteslowe, Water Eaton and Wolvercot, were by s. 5 of the Act of 1928 severed from the Woodstock union and added to the Headington union. This transfer did not affect in the least degree the financial relations then existing between the claimants and the respondents, nor did it affect their ratepayers, nor did it add one halfpenny to the burden of rates upon the ratepayers of the claimants. The only authorities affected were the guardians of the poor of the Woodstock union and the guardians of the poor of the Headington union. The first-named authority lost and the second-named authority gained the power to levy rates for public assistance in the parts of the three named parishes taken from the Woodstock union and added to the Headington union, and the parts of the three named parishes were profitable, in the sense I have already indicated, to the Woodstock union.

The claimants and the respondents, as appears from section 7 of para. I. of the special case, have agreed that, as a consequence of the transfer of the parts of those three parishes from the Woodstock union to the Headington union, there was an increase of burden upon the ratepayers in the Woodstock union in meeting the cost incurred by the Woodstock board of guardians in exercising their powers and duties as the poor law authority in their reduced area. This fact would have given rise to a claim for adjustment by the Woodstock board of guardians against the Headington board of guardians under the provisions of s. 61 of the Act of 1928.

But the Local Government Act, 1929, was passed and came into operation on April 1, 1930. This Act effected radical changes in the machinery for administering the poor law. After April 1, 1930, boards of guardians throughout the country ceased to exist and their functions were transferred to councils of administrative counties and councils of county boroughs. This change had a double operation in each administrative county and each county borough. It substituted the council of the county and of the county borough as the sole poor law authority in the place of the numerous boards of guardians and it substituted for the varying rates levied by the boards of guardians to meet the cost of public assistance in their respective unions one uniform rate throughout each county and each county borough to meet the cost of public assistance therein respectively and payable by the ratepayers of those authorities respectively.

The claim made by the claimants in respect of public assistance is formulated in section 17 (B) of para. I. of the special case and is in no way related to the claim the Woodstock board of guardians had or might have had against the Headington board of guardians. It is not a claim on behalf or in right of the ratepayers in the Woodstock union or on behalf or in right of the Woodstock board of guardians. It is a claim on behalf of the ratepayers throughout the administrative county of Oxford in relief of the burden upon them in respect of the cost of public assistance not in the old Woodstock union but throughout the administrative county of Oxford. It is a claim for an adjustment not in respect of an increase to a burden resting on April 1, 1930, upon the county ratepayers but in respect of a new burden placed upon such ratepayers for the first time on April 1, 1930, by the Local Government Act, 1929.

The crux of the matter is whether the language of s. 1 of the Local Government (Adjustments) Act, 1913, can be fitted to the facts out of which the present claim arises.

The language of that section seems to me to envisage first, a local authority exercising powers and duties in some given area, secondly, a change of boundaries effecting a transfer of a profitable part of the district of that local authority to another, and, lastly, as a consequence, an increased rate being levied upon the ratepayers in the reduced area of that local authority to enable it to exercise the same powers and duties in the reduced area. The language does not fit the case where after a change of boundaries has become an accomplished fact Parliament for the first time lays upon a local authority a new duty and upon the ratepayers of that authority a new burden to enable the local authority to discharge the new duty. Such a burden is not an increase to an existing burden as a consequence of change of boundaries. So to hold would, as it seems to me, enable adjustments to be made at any time if Parliament established a new public service, for example, hospitals for the sick, and laid the duty of performing it upon county councils and county boroughs and the burden of paying the cost of it upon the ratepayers of those authorities.

For these reasons, I would myself answer question (C) in para. II. of the special case in the negative.

The same process of reasoning would lead me to answer question (A) of the same paragraph in the same sense.

The facts that give rise to this question are that on April 1, 1929, parts of the Headington rural district council and of the Woodstock rural district council were by the Act of 1928 severed therefrom and added to and became part of the city and county borough of Oxford. At that date the councils of these two rural districts were road authorities with powers and duties to exercise in respect of certain roads. As appears from section 7 of para. I. of the special case, the claimants and respondents agree that as a consequence of the severance an increase of burden was thrown upon the ratepayers of the said rural districts in meeting the cost incurred by the said rural district councils in the execution of their powers and duties as road authorities as a consequence of the alteration of the boundaries of the city of Oxford, a state of facts which can be fitted exactly to the language of s. 1 of the Local Government (Adjustments) Act, 1913.

The councils of the rural districts each had a claim against the respondents for adjustment. The claims were suspended pending a decision in the case of *Godstone Rural District Council* v. *Croydon Corporation.* (1) The decision of the Court of Appeal was given in that case on July 22, 1932.

Thereafter the respondents agreed with the councils of the Headington rural district and of the Woodstock rural district respectively to pay them compensation for the increased burden upon their ratepayers to meet their costs as road authorities the respective sums of 1925*l.* and 650*l.* Following the decision of the Court of Appeal in the *Croydon Corporation* case (1), their claims were restricted to the period which ended on April 1, 1930.

---

(1) 96 J. P. 363.

By virtue of the provisions of the Local Government Act, 1929, on April 1, 1930, the said rural district councils and all other rural district councils in the administrative county of Oxford ceased to be road authorities and the roads which theretofore had been maintained by rural district councils became maintainable by the claimants. Just as in the case of their claim in respect of public assistance, so in the case of their claim in respect of road maintenance, the claimants' claim formulated in section 17 of para. I. of the special case has no relation to the claims of the Headington rural district council or the Woodstock rural district council, nor to any increase in burden upon their respective ratepayers.

It is a claim for adjustment in respect of a burden cast for the first time after April 1, 1929, upon a body of ratepayers who bore none of it until April 1, 1930, made by an authority who exercised no powers or duties upon the roads in question until the same date. We are not concerned in the present case to consider whether the decision of the Court of Appeal in the *Croydon Corporation* case (1) is right or wrong. The only question we have to consider is whether the language of the Local Government (Adjustments) Act, 1913, can be fitted to the facts out of which the present claims arise. For the reasons I have already given, I do not see how it can. Accordingly, I would answer the questions in para. II. (A) of the special case in the same sense as the Divisional Court did.

The alternative questions propounded in para. II. (B) and (D) seem to me to be based upon the idea of subrogating the claimants to the rights the Headington and Woodstock rural district councils might have had against the respondents, and to the right the Woodstock guardians might have had against the Headington guardians if the Local Government Act, 1929, had not been passed.

I can find nowhere in any statute a foundation for an award in favour of the claimants upon such an argument, and the right must be based on statute.

(1) 96 J. P. 363.

Accordingly, I would answer these questions in the negative.

C. A.
1938

OXFORD-SHIRE COUNTY COUNCIL *v.* OXFORD CITY COUNCIL.

Appeal allowed.
Leave to appeal to the House of Lords was granted.

Solicitors for appellants: *Cunliffe & Airy, for F. G. Scott, clerk to Oxfordshire County Council.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for A. Holt, town clerk, Oxford.*

J. R.

1938
April 6, 7.

LEWIS *v.* CATTLE.

Police—Police officer—" Person who holds office under His Majesty "—Official Secrets Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 28), *s.* 2, *sub-s.* 1.

A police officer, whether he be a member of the Metropolitan Police Force or a member of the police force of a county, city, or borough, holds the office of constable and as such is a " person " who holds office under His Majesty " within the Official Secrets Act, 1911, s. 2, sub-s. 1.

Case stated by justices.

At a court of summary jurisdiction sitting at Stockport an information was preferred by the respondent, Arnold Cattle, under s. 6 of the Official Secrets Act, 1920 (1), against the appellant, Ernest David Gibson Lewis, for that he the appellant unlawfully failed to give on demand to the respondent, being a superintendent of police appointed by a chief officer of police for the purpose, information in his power relating to a suspected offence under s. 2 of the Official Secrets Act, 1911. (1)

On the hearing of the information the following facts were proved or admitted :—

The appellant was at all material times a journalist in the employment of Allied Newspapers, Ld., on the staff of the

---

(1) By the Official Secrets Act, 1911, s. 2, sub-s. 1: " If any "person having in his possession "or control any . . . . information . . . . which has been "entrusted in confidence to him "by any person holding office "under His Majesty or which he "has obtained owing to his "position as a person who holds ". . . . office under His "Majesty . . . . (*a*) communicates the . . . . information "to any person, other than a "person to whom he is authorised "to communicate it, ... that "person shall be guilty of a "misdemeanour."

By the Official Secrets Act, 1920, s. 6: " It shall be the duty of "every person to give on demand "to a chief officer of police, or to "a superintendent or other officer "of police not below the rank of "inspector appointed by a chief "officer for the purpose . . . . "any information in his power "relating to an offence or suspected offence under the principal Act [i.e., Official Secrets "Act, 1911] or this Act . . . . "and, if any person fails to give "any such information or to "attend as aforesaid, he shall be "guilty of a misdemeanour."

1938

LEWIS
v.
CATTLE.

" Daily Dispatch." The respondent was at all material times a superintendent of police for the borough of Southport, in the county of Lancaster, and deputy chief constable of the borough. On June 11, 1937, a warrant was issued by the police force of the borough of Southport for the arrest of a man named Tansley Munnings on a charge of the fraudulent conversion of the sum of 5*l*. On June 14, 1937, information was circulated in writing by the Southport police force to certain other police forces. In the issue of the " Daily Dispatch " for June 17, 1937, there appeared a paragraph headed " Frauds on Workless "Alleged." The appellant was the author of the paragraph, which was in terms almost identical with those of the police circular. Distribution of the circular was by the ordinary course of post. It was intended by the Southport police to be for the information of the police only, but no intimation was sent with the document that that was the intention. At Southport a document such as that would be dealt with under close supervision and as confidential. There was no evidence of the practice in relation to such documents of other towns to which the document was sent, nor was there any evidence of the manner in which the document was dealt with in any place other than Southport. On occasions the police gave information to the Press to obtain the assistance of the Press, and circulars respecting wanted men and containing descriptions of them were frequently placed on notice boards in police offices. No instructions were given in the present case that the information could be given to the Press. On July 29, 1937, the respondent visited the residence of the appellant at 40 Derby Road, Heaton Moor, Stockport, and informed him that he (the respondent) had received the consent of the Attorney-General to make inquiries under s. 6 of the Official Secrets Act, 1920, and that he required from the appellant the name of the person from whom the appellant had received the information which was published in the paragraph, but the appellant refused to give any information as to the source from which he had obtained the material for the paragraph.

The justices found (*a*) that a police officer was in the service of His Majesty ; (*b*) that the police circular was a confidential

1938

LEWIS
v.
CATTLE.

document; (*c*) that there were reasonable grounds for suspecting that that document was confidential; and (*d*) that the appellant unlawfully failed to give on demand to the respondent information in his power relating to a suspected offence under s. 2 of the Official Secrets Act, 1911, contrary to s. 6 of the Official Secrets Act, 1920, and they imposed on the appellant a fine of 5*l*.

J. Catterall Jolly (*Sir William Jowitt K.C.* with him) for the appellant. The conviction of the appellant was wrong. Assuming that a police officer communicated to the appellant information which he had obtained through his official position, that police officer was not a "person who holds office under His "Majesty" within the Official Secrets Act, 1911, s. 2, sub-s. 1, and so did not commit any offence under that section relating to which the appellant, by the Official Secrets Act, 1920, s. 6, was under a duty to give any information in his power. A borough constable is appointed by the watch committee: Municipal Corporations Act, 1882, s. 191; and one-half of the money spent for police purposes is met by the local authority: Laws of England, 2nd ed., vol. 25, p. 294. It may well be that for many purposes a police officer does not act as the servant or agent of the local authority: *Fisher* v. *Oldham Corporation* (1); but it does not follow that he holds office under His Majesty, and the remarks of McCardie J. in *Fisher* v. *Oldham Corporation* (2) to the effect that a police officer is an officer of the Crown or a servant of the State were obiter and should be disregarded. On the contrary, there is high authority that the police are not servants of the Crown: *Coomber* v. *Berkshire Justices*, per Lord Watson. (3) The true view is that a police officer does not hold office under any one. He derives his authority from the law under which he acts: *Enever* v. *The King*. (4) Where it is desired that he should be treated as a servant of the Crown, special words have been necessarily included in statutes to secure that object, e.g.,

---

(1) [1930] 2 K. B. 364.
(2) Ibid. 371.
(3) (1883) 9 App. Cas. 61, 74.
(4) (1906) 3 Commonwealth L. R. 969.

National Economy Act, 1931, s. 1, Schedule; Firearms (Amendment) Act, 1936, s. 2 sub.-s. 3.

Valentine Holmes and *Fenton Atkinson* for the respondent. The conviction was right. Every police officer is a person "who holds office under His Majesty" within s. 2, sub-s. 1, of the Act of 1911, although he may not be in the service of the Crown. "Holds office under" are not words of art and s. 2, sub-s. 1, of the Act, if read in its ordinary and natural meaning, would include a police officer. The terms of the Police Act, 1919, show that the Home Secretary has the regulation and control of all the police forces in England and Wales, a position he has had with regard to the Metropolitan Police since the Metropolitan Police Act, 1829. For centuries all arrests of persons have been made by constables "in the King's name": see, for instance, *Mackalley's Case.* (1)

LORD HEWART C.J. [stated the facts and continued :] In my opinion, it is true to say that every police officer in England and Wales, whether he be a member of the Metropolitan Police Force or a member of the police force of a county, city, or borough, holds the office of constable, and within his constablewick he has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office and his primary duty is to preserve the King's peace. It follows that a police officer is a "person "who holds office under His Majesty" within the meaning of the Official Secrets Acts.

It may be well to observe that the justices, in submitting this case for the opinion of the Court, after stating correctly that the question at issue was whether a police officer was a "person who holds office under His Majesty," state that they find that a police officer is "in the service of His Majesty," being apparently under the impression that a person who serves His Majesty must necessarily hold office under His Majesty. That, however, is not the case. There are many offices which are held under His Majesty the holders of which are not in any proper sense of the words in the service of His

(1) (1611) 9 Co. Rep. 61 b, 64 a.

Majesty. So, also, there are many persons in the service of His Majesty who do not in any proper sense of the words hold office under His Majesty.

In my opinion, this case is too plain for argument, and the appeal should be dismissed.

HUMPHREYS J. I agree.

MACNAGHTEN J. I agree.

Appeal dismissed.

Solicitors for appellant: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitor for respondent: *Treasury Solicitor.*

G. F. L. B.

PRATT *v.* A. A. SITES, LIMITED.

1938
April 7.

Justices—Appeal—Case stated—Jurisdiction to hear complaint declined by justices—No adjudication on merits—Power to state case.

Complaints were preferred by the appellant against the respondents before justices, who decided that they had no jurisdiction to hear the complaints. The justices subsequently stated a case for the opinion of the Court whether they had come to a correct determination in point of law:—

Held, that, as the justices had not heard and determined the complaints but had declined jurisdiction, they had no power to state a case.

Wakefield Local Board v. *West Riding Ry. Co.* (1866) 30 J. P. 628 followed.

CASE stated by justices.

At a court of summary jurisdiction sitting at Willesden, Middlesex, a complaint was preferred by the appellant, Edwin Amos Pratt (the town clerk), on behalf of Willesden Corporation, against the respondents, A. A. Sites, Ld., for that on March 25, 1937, a notice under the provisions of cl. 40 of the Willesden Town Planning Scheme, 1933, to remove a certain advertisement displayed on and affixed to the front wall of No. 415, North Circular Road, Willesden, within the said borough, was duly served on the respondents, being the persons by whose actions or omissions serious injury was thereby caused to the amenity of the adjoining Character Zone 1 as defined in the scheme, and that the respondents had made default in complying with the requisitions of the notice. The appellant applied for an order directing the respondents to comply with the requisitions of the notice or otherwise to abate the injury.

On behalf of the respondents it was submitted: (*a*) that the procedure was not applicable and the machinery employed by the local authority was wrong and that the respondents were not amenable to the jurisdiction of the justices. The Town Planning Act, 1925, having been repealed by the Town and Country Planning Act, 1932, the proper legal machinery to be adopted should be that laid down by the Town and

Country Planning Act, 1932, s. 47; (*b*) that the notice given by the appellant to the respondents did not give the Act or section under which the respondents were brought before the Court; (*c*) that, by s. 47, sub-s. 1, of the Town and Country Planning Act, 1932, the respondents were entitled to not less than 28 days' notice to remove the advertisements and that, therefore, the notice given by the appellant to the respondents limiting a lesser period of time for the removal of the advertisements, was accordingly bad.

It was contended on behalf of the appellant in reply to the first submission made on behalf of the respondents: (*a*) that the local authority, in giving the notice to the respondents and in making the complaint to the justices, had acted lawfully in accordance with the provisions of cl. 40 of the Willesden Town Planning Scheme, 1933; (*b*) that the Willesden Town Planning Scheme, 1933, which was a scheme duly made and confirmed under the Town Planning Act, 1925, had not been amended, varied, repealed or revoked by the Town and Country Planning Act, 1932, but was preserved and remained valid and enforceable by the provisions of para. (*a*) of the proviso to s. 54 of that Act; (*c*) that the submission of the respondents was wrong in law.

The justices were of opinion that the first submission of the respondents was right. The procedure before a court of summary jurisdiction was clearly set out in s. 47, sub-ss. 2, 3, of the Town and Country Planning Act, 1932, and the justices had no jurisdiction to hear the complaints brought before them. They, therefore, dismissed the summonses without costs and without hearing the submissions of the appellant in reply to the second and third submissions of the respondents.

The question on which the opinion of the Court was desired was whether the justices had come to a correct determination in point of law.

Lyons K.C. and *B. A. C. Duncan* for the respondents, on a preliminary point. The justices decided that they had no jurisdiction to hear the summonses and they therefore had no power to state a case for the opinion of this Court: *Wakefield*

Local Board v. *West Riding Ry. Co.* (1) They have not dealt with the summonses and found facts on which they seek the direction of the Court, as the justices did in *Muir* v. *Hore* (2), where a case stated by them was entertained.

1938

PRATT
v.
A. A. SITES,
LD.

Monier-Williams for the appellant. The justices did not refuse jurisdiction. They considered the relevant enactments and came to a decision on them. In those circumstances they have power to state a case and the remedy of the appellant is not by mandamus: see per Wills J. in *Reg.* v. *Cotham.* (3)

LORD HEWART C.J. This is in form a case stated by justices, but, I think, only in form, because when it is examined a different complexion appears. The justices, having to some extent summarized the matter, say that they are of the opinion that the respondents were right in saying that they were not amenable to the jurisdiction and that they (the justices) had no jurisdiction to hear the complaints brought before them.

Whatever else may be doubtful in this case it seems to be perfectly clear that the justices expressed the view that they had no jurisdiction to hear the complaints which were before them. That being so, the position is the same as that disclosed in *Wakefield Local Board* v. *West Riding Ry. Co.*, where Blackburn J., addressing counsel for the appellants, said: (4) " Your proper course seems rather to have been to apply "for a rule by way of *mandamus*, calling on the justices to "hear the case, for they have not heard it yet. I think there "has never been an instance where the justices declined to "hear the case for want of jurisdiction and then stated a case "for the opinion of the superior Court." In his judgment Blackburn J. said (5): "I think nothing can be clearer "than that the justices made a mistake in granting the case, "as the statute 20 and 21 Vict. c. 43 [the Summary Jurisdic- "tion Act, 1857], does not apply. The justices, when the "question of jurisdiction was raised before them, decided,

---

(1) (1866) 30 J. P. 628.
(2) (1877) 41 J. P. 471.
(3) [1898] 1 Q. B. 802, 806.
(4) 30 J. P. 628, 629.
(5) Ibid. 629.

"rightly or wrongly, that they had no jurisdiction. If they "were right, then the parties can only go and renew the "information before other justices who are not interested. "If they were wrong, then the remedy is to apply for a rule "under Jervis's Act, commanding them to hear and determine "the case."

In the present case the justices have stated in language which is quite free from ambiguity that they had no jurisdiction to hear the complaints, and, in my opinion, this appeal should be dismissed on the preliminary point taken on behalf of the respondents.

HUMPHREYS J. I am of the same opinion. By the Summary Jurisdiction Act, 1857, s. 2: "After the hearing and determination by a justice or justices of the peace of any information "or complaint, which he or they have power to determine in a "summary way . . . either party to the proceeding before "the said justice or justices may, if dissatisfied with the said "determination as being erroneous in point of law, apply . . . "to the said justice or justices, to state and sign a case setting "forth the facts and the grounds of such determination, for "the opinion thereon of one of the Superior Courts of Law " . . . ." Those provisions were somewhat amended by s. 33 of the Summary Jurisdiction Act, 1879, which provides: "Any person aggrieved who desires to question a conviction, "order, determination, or other proceeding of a court of "summary jurisdiction, on the ground that it is erroneous in "point of law, or is in excess of jurisdiction, may apply to the "court to state a special case setting forth the facts of the case "and the grounds on which the proceeding is questioned, and "if the court decline to state the case, may apply to the High "Court of Justice for an order requiring the case to be stated." In my view, the later statute does not extend to get rid of the rule which existed long before it was passed—namely, that this Court will not hear a case stated except to dispose of the matters raised by the case. Where justices have not heard and determined the question before them, but have merely said: "We decline jurisdiction in this matter and we have no power "to adjudicate," this Court leaves the party aggrieved to his remedy. He is not without remedy.

This Court, therefore, has no power to entertain the present so-called case stated.

MACNAGHTEN J. I am of the same opinion.

Appeal dismissed.

Solicitor for respondents: *Frederick Wills.*

Solicitors for appellant: *Sharpe, Pritchard & Co., for Town Clerk, Willesden.*

G. F. L. B.

C. A.
1938
May 4, 5.

ALLEN AND ANOTHER *v.* TREHEARNE (H.M. INSPECTOR OF TAXES).

Revenue—Income tax—Profits or emoluments of office or employment taxable under Sch. E—Sum payable on termination of office—Office terminated by death—Assessment of executors in respect of terminal payment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E—Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 45, *sub-ss.* 5 *and* 6.

The Finance Act, 1927, s. 45, provides: "(5.) Where in any "year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend "chargeable under Schedule E, tax shall be charged for that "year on the amount of his emoluments for the period beginning "on the sixth day of April in that year and ending on the date "of the cessation. . . . ."

"(6.) In the case of the death of a person in whose case, if he "had not died, tax would, under the provisions of the last "preceding sub-section, have become chargeable for any year, "the tax which would have been so chargeable shall be assessed "and charged upon his executors or administrators, and shall be "a debt due from and payable out of his estate."

Where under a service agreement there was payable to the managing director of a company in addition to a fixed salary and commission a sum of 10,000*l.* to be paid to him or his executors on the termination of his service for any cause whatsoever (other than wilful default in the performance of his duties), and the sum of 10,000*l.* became payable by reason of his death, his executors were assessable to income tax on the sum of 10,000*l.* as part of the emoluments of his office under s. 45, sub-ss. 5 and 6, of the Finance Act, 1927.

Decision of Lawrence J. [1937] 2 K. B. 568 affirmed.

APPEAL from a decision of Lawrence J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts confirming an assessment to income tax under Sch. E for the year ending April 5, 1934, made upon the appellants, Frederick Allen and Stephen Murray, as executors of the will of Percy Murray, deceased. The assessment was made in respect of a sum of 10,000*l.* paid under an agreement of service on its termination.

Percy Murray at the time of his death held the office of managing director of Lewis Berger & Sons, Ld., under a

(1) [1937] 2 K. B. 568.

service agreement dated October 20, 1931. The period of service was ten years certain from August, 1930. A clause of this agreement provided that the company should pay to the managing director by way of remuneration for his services (*a*) a fixed salary; (*b*) a commission on the net profits of each year of the company and its subsidiaries as therein defined; and (*c*) a terminal sum of 10,000*l.*, with an addition thereto at the rate of 800*l.* for each year of service after July 31, 1935, to be payable by the company to Percy Murray or his personal representatives upon the final determination for any cause whatsoever (other than wilful default in the performance of his duties) of his service with the company. It was set out in the clause that in fixing this terminal payment the company had taken account of the long service rendered by Percy Murray to the company in one capacity or another, and that he would accept it in lieu of expectation of pension.

Percy Murray died on January 17, 1934, and on July 5, 1934, the company paid to the appellants, as his executors, the sum of 10,000*l.* in accordance with the clause of the agreement. The assessment appealed against was made upon the appellants to charge this sum.

The Commissioners stated their decision in the following terms: "Upon the death of Percy Murray his office ceased "and thereupon the sum of 10,000*l.* became payable by the "company to his executors. Although Percy Murray did not "become entitled to this sum at any moment during his life-"time it was, in our opinion, a profit of his office for the "year in which he died. Are, then, his executors liable to "be assessed? We hold that they are under sub-s. 6 of s. 45 "of the Finance Act, 1927. In the case of the death of a "person holding an office or employment, sub-s. 5 comes into "play and fixes the amount of the charge. Sub-s. 6 is not, "in our opinion, to be read as raising the hypothetical question "of what would have been the charge supposing the deceased "had not died but had ceased to hold the office or employment "for some other cause. It is simply in aid of the charge "which is ascertained under sub-s. 5, and provides—in terms "which it is true are elliptical—that the tax which has "become chargeable under sub-s. 5, and which would have "become chargeable upon the deceased if he had not died, "shall be assessed and charged upon his executors. We "confirm the assessment."

On appeal Lawrence J. said that in his opinion under sub-s. 6 of s. 45 of the Finance Act, 1927, the Commissioners had to see whether if the person had not died tax would have become chargeable under sub-s. 5 in the circumstances which had happened. They were not directed to make any other supposition, except that the deceased had not died. For the rest the facts which had actually happened—namely, that he had ceased to hold office and had received or become entitled to certain emoluments, must be looked to and the sur-tax charged upon his executors as it would have been charged upon him. He agreed with the decision of the Commissioners.

The executors appealed. The appeal was heard on May 4 and 5, 1938.

Raymond Needham K.C. and *T. N. Donovan* for the appellants. In view of an earlier decision of this Court it is impossible to argue here that the sum of 10,000*l.* was not remuneration and the question remaining to be argued is whether as this money never came into the hands of Percy Murray in his life-time, the provisions of the Income Tax Acts apply so as to enable income tax to be recovered in respect of it. The tax on a person in respect of the remuneration of an office is chargeable under Sch. E, the operation of which was extended in 1922 to the emoluments of a number of employments theretofore taxed under Sch. D. Then came the Finance Act, 1927, s. 45, the first object of which was to alter the basis of assessment so that tax under Sch. E was payable in respect of the emoluments of the previous year as was the case in respect of profits or gains taxed under Sch. D, as a result of the passing of the Finance Act, 1926. This matter is dealt with in s. 45, sub-ss. 1 and 2, of the Finance Act, 1927. The important sub-sections here are

C. A.
1938

ALLEN
v.
TREHEARNE.

however sub-ss. 5 and 6. The effect of sub-s. 5 is that if in any year a person ceases to hold an office, he is to be chargeable to tax on his actual earnings from April 6 of that year down to the date of its cessation. The assessment on the executors here purports to be made under s. 45, sub-s. 6, and the only other provision under which executors can be assessed is r. 18 of the All Schedules Rules of the Income Tax Act, 1918. A profit of an office does not become the profit of the person who holds the office unless he has received or could have received it. That is the condition of s. 45, sub-s. 5, operating, and that condition was not satisfied here. That being so s. 45, sub-s. 6, does not enable the Crown to assess the executors in respect of this sum of 10,000*l.* as its effect is limited to assessing the executors for something which their testator would have received if he had lived. Here the right to the payment arises from the testator's death so that the 10,000*l.* became a debt due to his estate.

[SIR WILFRID GREENE M.R. If the service agreement had come to an end in the life-time of Percy Murray, the terminal sum of 10,000*l.* would have been payable to him.]

Yes, but in the event which happened, it was his death that caused the cessation of his office and so made the sum payable. It could only be received after his death and therefore it was not his income but a sum due to his estate.

[SIR WILFRID GREENE. Before his death he was the possessor of a valuable right.]

But no money became presently payable in respect of it and the executors received it as a sum payable to them under the service agreement. Under r. 18 of the All Schedules Rules executors were only assessable to income tax in a representative capacity, so that the sum of 10,000*l.* could not have been assessed under this rule. Sect. 45, sub-s. 6, of the Finance Act, 1927, was passed to meet the change in the mode of assessment; but the only supposition provided for is that the person whose executors are to be taxed had not died. What the Income Tax Acts aim at charging is income of a person and not a sum becoming payable to his executors after his death that would not have been paid to him as income if he had lived. Although s. 45, sub-s. 5, provides for charging a person's stipend it must be payable to him: see *Dewar* v. *Inland Revenue Commissioners* (1) and *Woodhouse* v. *Inland Revenue Commissioners* (2) the principle of which is applicable here. No tax can be payable by executors as such unless a section can be found charging them with tax and here neither r. 18 of the All Schedules Rules nor s. 45, sub-ss. 5 and 6, of the Finance Act, 1927, is applicable. Lawrence J. has construed s. 45, sub-s. 6, in a manner which its terms do not admit.

[They also referred to *Rigden's Executors* v. *Inland Revenue Commissioners.* (3)]

Sir Donald Somervell A.-G. and *Reginald Hills* for the respondent. It is important to have regard to the words of Sch. E and particularly r. 1, the words of which are wide and directly charge the emoluments arising from the employment. Until the passing of the Finance Act, 1927, the charge under Sch. E was made on the emoluments of the actual year of assessment. The object of the Finance Act, 1927, s. 45, was to make the emoluments of the preceding year assessable and sub-ss. 5 and 6 of s. 45 became necessary for the purpose of dealing with the last year of employment. Those two sub-sections taken together cover this case. The sum of 10,000*l.* is admittedly an emolument of the office in the year that it terminated: *Edwards* v. *Roberts.* (4) Before dealing with this construction it is important to point out that a machinery or collecting rule should receive a liberal construction: *Drummond* v. *Collins* (5); *Whitney* v. *Inland Revenue Commissioners.* (6) In the latter case it was pointed out that there are three stages in regard to income tax—namely, (1.) the declaration of liability to charge, (2.) the assessment, and (3.) the method of recovery if the person assessed does not pay voluntarily. If therefore the Court is satisfied that a sum is prima facie chargeable to income tax it will not be astute to construe too narrowly words enabling the recovery of the tax to be made from the executors in the case of death. Whenever a person dies while holding an office sums are due which are not chargeable on him up to the moment of his death. For example, there is the accrued portion of his emoluments which has not become payable. It is true that the position in this case is somewhat different, but, when an emolument accrues on the cesser of a person's office, it is perfectly proper to call it part of the emoluments arising to him from his office. It cannot be that under s. 45, sub-s. 6, of the Act of 1927, the assumption to be made is that the holder of the office had not died but had gone on in his office. The whole basis of the tax is the cesser of the office. Therefore when the supposition is to be made that the holder of the office had not died, that does not involve the further assumption that he had continued to hold his office. The one thing to be assumed is that he is still living and if living would have been chargeable to tax. That leads necessarily to the view that Percy Murray is to be regarded as having ceased to hold his office and received the terminal sum of 10,000*l.*

---

(1) [1935] 2 K. B. 351; 19 Tax Cas. 561.

(2) (1936) 20 Tax Cas. 673.

(3) (1934) 19 Tax. Cas. 474.

(4) (1935) 19 Tax Cas. 618.

(5) [1915] A. C. 1011, 1019; 6 Tax Cas. 525, 540.

(6) [1926] A. C. 37, 52; 10 Tax Cas. 88, 110.

Sub-s. 6 is purely a collecting sub-section for enabling the tax to be collected that is provided for in sub-s. 5. For this purpose it simply contemplates the removal of the obstruction that prevented sub-s. 5 from imposing an effective charge in respect of the emoluments of an office that has ceased by reason of the death of the holder. As regards the authority cited on behalf of the appellants, *Dewar* v. *Inland Revenue Commissioners* (1) has no application here. So too *Rigden's Executors* v. *Inland Revenue Commissioners* (2) cannot be applied to different provisions in a different part of the Income Tax Acts. This case rests solely on s. 45, sub-ss. 5 and 6, and the construction given to them by Lawrence J. was right.

Raymond Needham K.C. replied.

SIR WILFRID GREENE M.R. This appeal raises a short

---

(1) [1935] 2 K. B. 351.

(2) 19 Tax Cas. 474.

C. A.
1938
ALLEN
v.
TREHEARNE.
Sir Wilfrid
Greene M.R.

point which is not without some difficulty, but as we have formed a clear opinion as to the way it should be decided there is nothing to be gained by reserving our judgment upon it.

The appellants are the executors of one Mr. Percy Murray who died on January 17, 1934. At the date of his death he was in the employment of a company named Lewis Berger & Sons, Ld., under a service agreement dated October 20, 1931. Under that agreement he was appointed managing director for a term of ten years from August 1, 1930. The agreement contained a provision for determination of the agreement by Mr. Murray and by the company respectively. In the case of Mr. Murray he was entitled to determine it at any time after July 31, 1935, by giving to the company six months' notice in writing. The salary or remuneration to which he was entitled is divided in the agreement under three heads. All those heads are described as remuneration for his services. The first head is a fixed yearly salary. The second head is a commission on profits. The third head is described as " a terminal sum of 10,000*l.* with an addition "thereto at the rate of 800*l.* for each year of service after "the 31st July, 1935, to be payable by the Company to the "managing director or his personal representatives upon the "final termination from any cause whatsoever (other than "the wilful default of the managing director in the performance of his duties) of his service with the Company." That is, I think, all that I need read there.

As I have said, Mr. Murray died on January 17, 1934, that is to say, before he had become entitled to give notice of determination of the agreement. Nevertheless by virtue of the provision which I have just read he became upon his death—that being a termination of the agreement—entitled to the terminal sum of 10,000*l.* therein mentioned. That sum was in fact paid by the company to the appellants as Mr. Murray's executors on July 5, 1934, and an assessment was made upon them in respect of that sum under Sch. E for the year ending April 5, 1934, that is to say, the financial year within which the death took place and not the financial year in which the payment was in fact made. No suggestion is made that assuming the Crown is right in its claim to make an assessment on the executors in respect of this sum, the wrong year has been taken as the year of assessment.

On those facts the Special Commissioners decided that the executors were assessable, and they confirmed the assessment. That decision was affirmed on appeal by Lawrence J., and from his decision the present appeal is brought.

Before examining the provisions of the statutes which affect this matter it is important to bear in mind what exactly the subject-matter is with which we have to deal. First of all, it is remuneration for services performed under an agreement; it is so described in the agreement itself, and it is by serving under that agreement, and only by serving under that agreement, that Mr. Murray would become entitled in the end to receive that terminal payment. All the time that he was serving he was earning that sum although the date of payment, of course, did not arrive until the determination of the agreement.

The next point to observe is that the sum in question was one, the occasion for payment of which would differ according to events. The payment might fall to be made during the life-time of Mr. Murray on the conclusion of the term of the agreement. It might fall to be paid by reason of the agreement coming to an end by notice. It might fall to be paid by the agreement coming to an end by the death of Mr. Murray; but the nature and quality of the payment, speaking now as a matter of fact and without reference to anything in the Income Tax Acts, does not become different, because the occasion on which it falls to be made is not the same in every case. It would be just as much remuneration if it was paid on the occasion of death as if it was paid on the occasion of determination by notice or by effluxion of time. In essence, looking at the contract itself, this sum bears the same quality and character whatever be the occasion upon which it becomes payable.

That being the nature of the subject-matter looked at apart from the relevant provisions of the Acts, it is necessary now

C. A.
1938

ALLEN
v.
TREHEARNE.

Sir Wilfrid Greene M.R.

to consider those provisions. It is not disputed in this Court that a payment of that character is an income payment in its nature for the purposes of the Income Tax Acts, nor is it disputed that a payment of that character is a payment which falls, so far as its nature is concerned, under Sch. E.

It is submitted on behalf of the appellants as a matter of form in this Court that neither of those propositions is correct, but Mr. Needham informed us that he was unable to press that proposition before this Court because he felt that it was concluded in this Court by authority. We therefore proceed upon the footing that by its nature the payment is an income payment and a Sch. E subject-matter.

Now Sch. E provides as follows: "Tax under Schedule E "shall be charged in respect of every public office or employ"ment of profit, and in respect of every annuity, pension, or "stipend payable by the Crown or out of the public revenue "of the United Kingdom, other than annuities charged under "Schedule C, for every twenty shillings of the annual amount "thereof." Rule 1 provides: "Tax under this Schedule shall "be annually charged on every person having or exercising "an office or employment of profit mentioned in this Schedule, "or to whom any annuity, pension, or stipend, as described "in this Schedule, is payable, in respect of all salaries, fees, "wages, perquisites or profits whatsoever therefrom for the "year of assessment." Pausing there for a moment, and considering that language in relation to a payment of this character, the first question that would arise, assuming that this is income as we must assume it to be, would be, is the payment one which is properly described as salary therefrom, that is to say, salary from an office or employment had or exercised by a person. There can be no question whatsoever that this sum if it had been received by Mr. Murray in his lifetime would have fallen exactly within those words. The sum was one which would have come from his office or employment in that case. I cannot myself see that any the less in the present case it has come from his office or employment. That is the source of it. It was that which gave rise to it. It was by performing the services under the agreement that he earned it. If I may interpose the observation here, an expression used by Mr. Needham in the course of his argument was one which I for one considered to be not an accurate expression. Mr. Needham referred to the sum on the facts of this case as arising by the death or coming into existence through the death. As I have ventured to point out, the death was the occasion which made payable a sum that was, so to speak, maturing all the time, and it was not the death which made it payable; it was on the death that it became payable instead of becoming payable on another event which would have happened if the death had not occurred.

The method of assessment under Sch. E down to the year 1927 was by reference to the emoluments of the year of assessment, but by the Finance Act of 1927 that was altered and Sch. E was put into the same position as Sch. D had been put, that is to say, the year before the year of assessment was taken as the measure of the profits. Sect. 45 of the Finance Act, 1927, makes provision for that, and in two sub-sections it makes provision for the case of a person ceasing to hold an office. It is upon those two sub-sections, namely, sub-s. 5 and sub-s. 6, that the present question immediately turns. Sub-s. 5 provides as follows: "Where "in any year of assessment a person ceases to hold an office "or employment or to be entitled to an annuity, pension or "stipend chargeable under Schedule E, tax shall be charged "for that year on the amount of his emoluments for the "period beginning on the sixth day of April in that year and "ending on the date of the cessation." That is all I need read from that sub-section.

That sub-section contains one or two phrases which require examination. The first word is the word "ceases"—"Where "a person ceases to hold an office." That word is quite general, and you may cease to hold an office by resigning or by being dismissed or by dying; and I can see no reason whatsoever for excluding from the word "ceases" the meaning "ceases by death"—and indeed that that must be so is, I think, apparent when one observes that two of the subject-matters with which the sub-section is dealing, the common Sch. E subject-matters, are annuities and pensions, the normal reason for the cessation of which is of course death.

Taking that meaning of the word "ceases" I wish to examine the sub-section in reference to the facts of this case with a view to seeing whether or not the language is applicable to those facts. I will take it phrase by phrase: "Where in "any year of assessment a person ceases to hold an office or "employment." In the year of assessment 1933–34 Mr. Percy Murray ceased to hold the office of managing director which he held under this agreement, and he so ceased by death. I proceed: "tax shall be charged for that year on the amount "of his emoluments for the period beginning on the sixth "day of April in that year and ending on the date of the "cessation."

Looking first of all at the period there defined, the period would be that beginning on April 6, 1933, and ending at his death on January 17, 1934, that being the date of cessation. Is there any subject-matter in this case which answers to the description "the amount of his emoluments for that period"? I should have thought as a matter of English that the 10,000*l.* were properly and accurately described as his emoluments for that period. That they were emoluments paid in respect of the office is unquestionable. If they were not his, whose were they? They were not his executors' emoluments, because they had never held the office. They were someone's emoluments, and they could only have been his. It appears to me that the words "his emoluments" do not involve, as Mr. Needham would have us hold, that at the very moment when according to the contract the emolument became payable the man must be alive. The first thing to ascertain is, is there any subject-matter which can be described as his emoluments? The word "emoluments" does not appear, I think, in Sch. E itself or the rules thereunder. but it is defined in sub-s. 10 of the present s. 45 of the Act of 1927 as follows: "In this section the expression 'emoluments' "means all salaries, fees, wages, perquisites or profits or gains "whatsoever arising from an office or employment, or the "amount of any annuity, pension or stipend, as the case "may be." This, it seems to me, was a salary arising from the office which Mr. Murray held, and it was arising to him in this sense, that it was his remuneration according to the contract for the services performed by him under that contract.

My conclusion upon the language of sub-s. 5 is that taking that sub-section by itself and construing it according to its natural construction in relation to the facts of this case this 10,000*l.* would fall under the language of it as a proper subject-matter of charge. But the difficulty, of course, arises in that the person holding the office who is the person to be assessed is dead, and therefore in view of the circumstance among others that death is one of the occasions on which a person may cease to hold an office it was necessary to provide for that event.

Before proceeding to an examination of sub-s. 6 I would call attention to this circumstance. A person entitled to an annuity or pension who dies during a pension year or annuity year would normally be entitled, either by contract or, where it applies, under the Apportionment Act, to receive in respect of the broken period down to his death an apportioned part of the pension or annuity. It seems to me that in that case the sum which his executors are entitled to receive is a sum which becomes payable, and only becomes payable, by reason of the death in this sense, that, if he had not died, that apportioned sum would never have become payable. I only call attention to that because, annuities and pensions being two of the matters which are particularly provided for, that state of affairs is apparent the moment one begins to consider this subject-matter; and if I have followed Mr. Needham's argument correctly, in the case which I have put the apportioned sum payable on an occasion of that kind would escape taxation. I invited him to suggest any reason for differentiating that case from the present, and no reason which at any rate produced any satisfactory impression on my mind was adduced. Of course the Income Tax Act has many holes in it and holes through which the taxpayer succeeds in finding his way; and if there be a hole there of the nature

C. A.

1938

ALLEN
v.
TREHEARNE.

Sir Wilfrid Greene M.R.

which Mr. Needham stands for, then of course we must recognize its existence. But the effect of his argument is really, I think, what I ventured to put to him in the course of it, but which he protested was too crude a way of putting it—namely, that a subject-matter of charge has found a hole in the net of assessment, as the deceased person cannot be assessed because he is dead and the executors cannot be assessed because the case does not come within sub-s. 6, which I shall now proceed to examine. Sub-s. 6 provides this : " In the case of the death of a person in whose case, "if he had not died, tax would, under the provisions of the "last preceding sub-section, have become chargeable for any "year, the tax which would have been so chargeable shall be "assessed and charged upon his executors or administrators, "and shall be a debt due from and payable out of his estate." On the face of that sub-section there is a phrase of which Mr. Needham has naturally endeavoured to avail himself, because it is a phrase which at once suggests, and suggests not without force, the point which he has raised ; it is the phrase " if he had not died." Mr. Needham says that this 10,000*l.* was never income of Mr. Murray ; although it was of an income character it was not income of Mr. Murray because he never could have got it during his lifetime, and, if he had not died, there never would have been any question of chargeability to tax, because the sum would never have become payable at all.

In my opinion that argument involves construing this sub-section in much too narrow a way. The point is really a very short one, and as I read the sub-section what it is contemplating is this. It is contemplating that there is an obstacle which prevents sub-s. 5 creating an effective charge in respect of emoluments of an office which has ex hypothesi ceased, and that obstacle is the fact of the death of the holder of the office. The sub-section on its true construction appears to me to be directed, at any rate so far as the facts of this case are concerned and cases like it, to removing that obstacle and substituting as the persons to be charged the executors or administrators of the deceased person. Putting that in rather different language, the death is regarded as the thing which prevents the charge from being an effective charge, and the effect of death as giving rise to a right to the apportioned emoluments has already been assumed in sub-s. 5, because you have only come to sub-s. 6 after you have decided that a cessation has taken place. Death in so far as it operates to produce a cessation has already performed its function for the purpose of sub-s. 5, and therefore so far as that is concerned death is, so to speak, functus officio, and you then approach sub-s. 6 with the fact of cessation established, and the fact that cessation arose through death is not relevant for the purpose of sub-s. 6. When you come to sub-s. 6 the words " if he had not died " are used, and those words are referring, in my judgment, simply to the question of there being a person to be charged in respect of something which ex hypothesi has become chargeable under sub-s. 5.

I have put in rather more extended language what I understand the learned judge to have said in more concise language in his judgment. What Lawrence J. said was this : " In my "opinion, under sub-section 6 the Commissioners have to see "whether if the person had not died tax would have become "chargeable under sub-section 5 in the circumstances which "have happened. They are not directed to make any other "supposition except that the deceased has not died. For "the rest, the facts which have actually happened, namely, "that he has ceased to hold office and has received or become "entitled to certain emoluments, must be looked to and the "same tax charged upon his executors as would have been "charged upon him." I might perhaps have been better advised if I had contended myself with adopting the admirably concise language of the learned judge. All I can hope is that in expressing what I conceive to be the same reasoning in my own language I have not added any obscurity to the subject-matter.

In my opinion the appeal fails and must be dismissed.

Scott L.J. I agree with the Master of the Rolls, and I only

C. A.
1938

ALLEN
v.
TREHEARNE.

Scott L.J.

add certain considerations which seem to me important in view of the argument which has been advanced on behalf of the appellants. Broadly speaking, the ground upon which I think the appeal should be dismissed is that liability in respect of the emoluments of this office was established by r. 1 of the rules belonging to Sch. E, that the rules we have been considering which are expressed in s. 45, sub-ss. 5 and 6, are rules affecting assessment and collection, and that, if there is any difficulty in the precise applicability in the language of those sub-sections, it should be interpreted largely and generously in order not to defeat the main object of liability laid down by r. 1 of Sch. E.

The principle applicable is that enunciated by Lord Parker in the case of *Drummond* v. *Collins* (1) and the passage in question cited by the Attorney-General is (2): "This section "is a collecting section and not a taxing section, and there "is no reason in principle why it should not receive a liberal "interpretation." In a later case, the case of *Whitney* v. *Inland Revenue Commissioners* (3), Lord Dunedin said this: "My Lords, I shall now permit myself a general observation. "Once that it is fixed that there is liability, it is antecedently "highly improbable that the statute should not go on to "make that liability effective. A statute is designed to be "workable, and the interpretation thereof by a Court should "be to secure that object, unless crucial omission or clear "direction makes that end unattainable. Now, there are "three stages in the imposition of a tax: there is the "declaration of liability, that is the part of the statute which "determines what persons in respect of what property are "liable. Next, there is the assessment. Liability does not "depend on assessment. That, ex hypothesi, has already "been fixed. But assessment particularises the exact sum "which a person liable has to pay. Lastly, come the methods "of recovery, if the person taxed does not voluntarily pay."

Under r. 1 of Sch. E it is laid down: "Tax under this

---

(1) [1915] A. C. 1011; 6 Tax Cas. 525.
(2) [1915] A. C. 1019; 6 Tax Cas. 540.
(3) [1926] A. C. 37, 52; 10 Tax Cas. 88, 110.

"Schedule shall be annually charged on every person having "or exercising an office or employment of profit mentioned "in this Schedule, or to whom any annuity, pension, or "stipend, as described in this Schedule, is payable, in respect "of all salaries, fees, wages, perquisites or profits whatsoever "therefrom for the year of assessment." The Master of the Rolls drew attention to the word "therefrom," and it is a word of extreme importance in considering this question of liability to tax under Sch. E. As I read it, it is the intention of the Legislature to exact tax under Sch. E in respect of all profits whatsoever that come from the office.

Having regard to the agreement in this case, there can, it seems to me, be no question whatever that this 10,000*l.* fee was essentially a profit or emolument from the office of managing director. The only question is whether the death of Mr. Murray prevented the Revenue from obtaining the tax which, in my view, it was intended should be obtained by reason of the provision of r. 1 under Sch. E. Rule 2 under Sch. E, which deals with the case of death, was repealed by s. 45, sub-s. 9, of the Act of 1927, and therefore we need not consider it. Rule 18 is not strictly applicable here, because that rule applies only to profits which had arisen or accrued to the taxpayer before his death. The sub-sections therefore which are applicable are only those two to which my Lord has referred—namely, sub-ss. 5 and 6 of s. 45 of the Act of 1927.

I entirely agree with the construction put by my Lord upon the provision in sub-s. 5 that "tax shall be charged for "that year on the amount of his emoluments for the period" down to the date of cessation. It is quite true that strictly speaking the emolument in question never became his in the sense that the quantitative amount of 10,000*l.* became his property. It never became payable to him, because he died. But that it was his emolument under the agreement with the company in a broad sense seems to me to be obvious, and in order to prevent the Revenue's failure to get the tax which was intended by r. 1 of Sch. E, it appears to me to be legitimate to treat the words in question as meaning "on

C. A.
1938

Allen
v.
Trehearne.

Scott L.J.

"the amount of the emoluments attaching to the office which "he held." If that is the right interpretation of them, then I see no difficulty in applying sub-s. 6 for the purpose of collection. The only object of sub-s. 6 is to prevent the failure of the Revenue through inability to collect the tax; and provision that the tax should be exigible from the executors or administrators is, to my mind, merely a provision concerning collection which we ought to treat as reasonably expressed to cover such a case as has arisen here—a case which falls, in my view, within the words of sub-s. 5.

I confess that during the argument of the case I have had some doubt, but having regard to the fact that the intention to impose liability is clear in this case by reason of the wording of r. 1 of Sch. E, we ought in my view to have no hesitation in giving what I may call a commonsense interpretation to the machinery rules, sub-s. 5 and sub-s. 6 of s. 45 of the Act of 1927.

I therefore agree with the judgment which has been given by the Master of the Rolls.

Clauson L.J. I agree with the judgments delivered by the Master of the Rolls and Scott L.J. I will only add that statutory provisions have been in existence since 1842 and are now represented by s. 161 of the Act of 1918, which seem to make it clear that the scheme of the Income Tax legislation involves that, if a person chargeable to tax dies, his executor or administrator is normally liable for the tax charged on the deceased person. The construction which we are giving to s. 45 of the Act of 1927 at all events has the merit of fitting that section satisfactorily into the general scheme of income tax legislation.

Appeal dismissed.

Raymond Needham K.C. My Lord, I am informed by those instructing me that certain cases are dependent upon this particular case. I do not know whether your Lordship would give me a little time in which to consider whether or not I should ask the Court for leave to appeal. Might I mention the matter to your Lordship at an early date in order to give my clients an opportunity of considering the matter ?

SIR WILFRID GREENE M.R. Yes, Mr. Needham, you are entitled to some reasonable time for consideration, but I ought perhaps to say this, that, as will appear in the publication where such things do appear, the practice of the Court will be that in cases where leave to appeal to the House of Lords is asked for, unless it is asked for in the presence of the other side at the conclusion of the appeal, it must be asked for on notice to the other side.

Solicitors : *Windybank, Samuell & Lawrence ; Solicitor of Inland Revenue.*

H. C. G.

C. A.
1938
May 11, 12.

COMMISSIONERS OF INLAND REVENUE *v.* BRITISH SALMSON AERO ENGINES, LIMITED.

BRITISH SALMSON AERO ENGINES, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Patent—Grant of Exclusive Licence—Consideration—In part lump sum payable in three instalments—In part annual royalties—Capital or income—Lump sum a capital sum—Royalties subject to income tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3 (*m*) ; *All Schedules Rules, rr.* 19, 21.

Rule 21 of the All Schedules Rules to the Income Tax Act, 1918, provides: "(1.) Upon payment . . . . of any royalty or "other sum paid in respect of the user of a patent, not payable, "or not wholly payable out of profits or gains brought into "charge, the person by or through whom any such payment is "made shall deduct thereout a sum representing the amount of "the tax thereon at the rate of tax in force at the time of the "payment." By sub-r. 2 (as amended) the payer is bound to account for the tax to the Revenue :—

Held, that the rule does not make tax necessarily payable on any royalty or other sum paid in respect of the user of a patent. It must be determined on the facts of the particular case whether the payment is a capital or income payment, and income tax is payable on income payments only.

Lanston Monotype Corporation, Ld. v. *Anderson* [1911] 2 K. B. 1019 applied.

Constantinesco v. *R.* (1927) 11 Tax Cas. 730 and *Mills* v. *Jones* (1929) 14 Tax Cas. 769 considered and explained.

Decision of Finlay J. affirmed.

APPEAL from a decision of Finlay J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on October 23, 1935, British Salmson Aero Engines, Ld. (hereinafter called "the English company"), appealed against the following assessments to income tax—namely :—

(*a*) An assessment in the sum of 15,000*l*. for the year ending April 5, 1930.

(*b*) An assessment in the sum of 12,133*l*. 5*s*. for the year ending April 5, 1931.

(*c*) Assessments in the sum of 1950*l.* for each of the years ending April 5, 1932, 1933, 1934.

All the assessments were made under r. 21 of the General Rules applicable to Schs. A, B, C, D and E of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, and were in respect of sums paid by the English company to a French company called the Société des Moteurs Salmson of France (hereinafter called " the French company ") to acquire the sole licence to manufacture and sell in the United Kingdom of Great Britain and Ireland, its dominions, colonies and dependencies, the aeroplane engines made by the French company.

By an agreement dated October 25, 1929, and made between the French company (therein called " the Constructors ") and the English company (therein called "the Licensees") it was covenanted and agreed as follows :—

PRELIMINARY.

"The object of the present agreement is to grant to the "licensees, the exclusive right for the period of 10 years "from 25th October, 1929, until 24th October, 1939, to "construct use and sell in the United Kingdom of Great "Britain and Ireland and its Dominions the Salmson aero "engines described as 9 A.D. 40 H.P.—5 A.C. 60 H.P.— "7 A.C. 95 H.P. and 9 A.C. 120 H.P."

Article I. provided that the Constructors would furnish the Licensees—

(*a*) with designs for the construction of the types of engine above mentioned ;

(*b*) with such information and assistance as was at their disposal to facilitate the manufacture and sale in England ;

(*c*) with access to their aviation works for five of the licensees' staff ;

(*d*) with the free use of the devices patented by the Constructors in use in all the above mentioned types of motors ;

(*e*) with the right to use Salmson Engines.

The article concluded : " During the life of these covenants, "the Constructors shall not sell direct in the United Kingdom

C. A.
1938

Inland Revenue Commissioners v. British Salmson Aero Engines, Ld.

"of Great Britain and Ireland and its Dominions the types "of engines this subject of this licence."

ARTICLE II.

"As consideration for the licence thus granted to them the "Licensees shall pay to the Constructors the sum of 25,000*l.* "(twenty-five thousand pounds) payable as follows :—

"15,000*l.* on the signing of this agreement ;

"5000*l.* six months after the signing of this agreement ;

"5000*l.* twelve months after the signing of this agreement.

"There shall be paid in addition to the foregoing payments "and as royalty 2500*l.* twelve months after the signing of "this agreement, and a like sum each twelve months during "the following nine years.

"These various payments shall be made at the Société "Générale pour favoriser le développement du Commerce "et de l'Industrie en France A. J. Agency 91 Avenue des "Champs Élysées in Paris.

"In default of payment within a fortnight of a demand "made by registered letter to the Licensees of any of the "above payments this agreement shall become void and sums "paid by the Licensees shall remain the property of the "Constructors together with any damages and interests which "the Constructors may claim from the Licensees."

Article IV. contained agreements (1.) that in the event of proceedings with a view to revoking the patents in the agreed territory, the Constructors would do everything necessary to keep them in force ; (2.) for sharing the expenses and responsibilities if the motors manufactured by the Licensees were made the subject-matter of proceedings for infringement ; (3.) that in the event of infringement of the patents the Constructors and the Licensees should take all necessary legal proceedings to protect the patents and should share the costs of the actions and the risks or advantages resulting therefrom.

ARTICLE V.

"The Licensees shall have the right to grant to any persons, "firms or companies within the above mentioned territories "such sub-licence as they may think desirable and nothing "herein contained shall permit any sub-licensee to break "the provisions regarding the territory for which the licence "is granted."

Article VII. contained covenants by the Constructors not to manufacture or sell directly in the countries granted to the Licensees and by the Licensees not to manufacture or sell directly outside these countries engines of the above mentioned types.

This agreement was entered into in France and was in the French language.

The negotiations leading up to the agreement of October 25, 1929, were commenced early in the year 1929, and copies of translations of three letters dated March 22, July 24, and July 25, 1929, were attached to the case to indicate the course of the negotiations.

In pursuance of Article II. of the agreement the company paid to the French company 15,000*l.* in the year 1929–30, 12,500*l.* in the year 1930–31, 2500*l.* in each of the years 1931–32, 1932–33, and 1933–34. In respect of these payments assessments under r. 21 of the General Rules as amended by s. 26 of the Finance Act, 1927, were made upon the company.

It was contended on behalf of the company that—

(*a*) All the said payments were payments of a capital nature;

(*b*) the said payments were instalments of a capital sum, which was the purchase price of a capital asset;

(*c*) the company was not assessable to income tax in respect of any of the said payments.

It was contended on behalf of the Crown (inter alia) that—

(*a*) all the said payments were royalties or other sums paid in respect of the user of a patent;

(*b*) the company was assessable under r. 21 of the General Rules in respect of all the said payments made by them to the French company;

(*c*) the assessments were correct and should be confirmed.

Having considered the evidence and arguments adduced before them the Commissioners decided as follows:—

"By an agreement dated October 25, 1929, the appellants "were granted the exclusive right for the period of ten years

C. A.
1938

Inland Revenue Commissioners v. British Salmson Aero Engines, Ld.

"to construct, use and sell in the United Kingdom of Great "Britain and Ireland and its Dominions Salmson aero engines.

"The consideration for this exclusive licence is set out in "Article II. of the said agreement.

"In determining the nature of the payments to be made "under Article II. we do not consider that we are entitled "to go outside the terms of the agreement itself and rely in "any way upon the negotiations between the parties before "the said agreement was entered into.

"We hold that the sums of 15,000*l.*, 5000*l.* and 5000*l.* "represent instalments of a capital sum of 25,000*l.*

"We hold that the appellants are not assessable under "r. 21 of the General Rules in respect of these payments.

"As regards the ten further payments of 2500*l.*, we hold "that these payments are royalties or other sums paid in "respect of the user of a patent, and that the appellants are "assessable in respect thereof under r. 21."

The assessments were adjusted in accordance with the principle laid down in this decision to figures which were agreed between the parties.

Finlay J. said that there was an appeal and a cross-appeal from the decision of the Special Commissioners, and he had arrived at the conclusion that their decision ought to be affirmed and neither appeal allowed.

There had been a long line of authorities dealing with the question of capital or income, and two of the most recent cases in the Court of Appeal were *Inland Revenue Commissioners* v. *Ramsay* (1) and *Dott* v. *Brown.* (2) But when these cases were read very little more could be obtained from them than that the question of capital or income was a question to be decided upon a survey of the particular facts in each particular case.

The particular matter here had reference to royalties which were dealt with in r. 19, sub-r. 2, and r. 21 of the General Rules, and it turned really upon the agreement. Mr. Needham had contended that the Special Commissioners were wrong in their decision as regards the ten yearly payments of 2500*l.*, and argued that the contention that they were called royalties was not conclusive. This was true, but it was a matter that must not be entirely neglected. Mr. Needham argued that they were part of the purchase price for the thing sold; but he could not regard the fact that the grant was of an exclusive licence turned the licence into a sale of property. This was an agreement for the grant of a licence to use, and it followed that the decision of the Special Commissioners as to the annual sums was correct.

---

(1) (1935) 20 Tax Cas. 79.

(2) (1936) 154 L. T. 484.

The payment of 25,000*l.* in three sums of 15,000*l.*, 5000*l.* and 5000*l.* stood on a different footing. It was quite possible that a licence might be sold partly in respect of a lump sum and partly in respect of royalties. Attention had been drawn to *Desoutter Bros., Ld.* v. *J. E. Hanger & Co., Ld.* (1) That case was in point here and in his view rightly decided. He thought therefore that the Special Commissioners were right on this part of the case also.

The Crown appealed, and there was a cross-appeal by the company. The appeal and cross-appeal were heard on May 11 and 12, 1938.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. The assessment in respect of the sum of 25,000*l.* to which the Crown's appeal relates was made, like the assessment on the royalties, under r. 21 of the All Schedules Rules to the Income Tax Act, 1918. It is contended that this assessment stands on the same footing as the other assessment, because it is a payment in respect of the user of a patent, and comes within the words in rr. 19 and 21: "royalty "or other sum paid in respect of the user of a patent." Finlay J. would have decided in favour of the Crown but for the decision of MacKinnon J. in *Desoutter Bros., Ld.* v. *J. E. Hanger & Co., Ld.* (1), which it will be contended is wrong.

A payment does not become capital by being made in a lump sum any more than payments necessarily become income because payment is made in instalments. It is clear that the payment of 25,000*l.* in three instalments is a payment for

(1) [1936] 1 All E. R. 535.

the user of the patent and in principle sums paid for the user of a patent are income. The criterion for distinguishing between capital and income is extremely difficult to formulate, but the express provisions of the rules make payments for the user of a patent income in all cases. When a patent is acquired by a capital payment that is not a payment for the user of the patent.

The decision in *Constantinesco* v. *R.* (1) shows that the fact that the payment is made in a lump sum does not cause it to lose its character of income. A distinction has been drawn on the ground that in *Constantinesco's* case (1) payment was being made for past user and that it did not apply when a licence was to operate in the future. But in *Mills* v. *Jones* (2) the payment was for past, present and future user of the patent for the Mills bomb. There the payment was held to be income, but it is true that the Commissioners held the future user to be negligible, as there was such a large stock of the bombs on hand at the time of the Armistice. *Inland Revenue Commissioners* v. *Longman, Green & Co.* (3), which related to payment for a licence to use a copyright, decided the same thing in regard to the lump sum payable in respect of the first 28,000 copies.

In *Desoutter Bros., Ld.* v. *J. E. Hanger & Co., Ld.* (4) a licence was granted for five years for a lump sum down and yearly payments. The decision that income tax could not be deducted in paying the lump sum was wrong in principle and inconsistent with what was laid down in *Constantinesco's* case (1) and *Mills* v. *Jones.* (2) In *Dott* v. *Brown* (5) the cases relating to how far a lump sum payment ceased to be a capital payment by being paid by instalments were considered, and it was said that it was impossible to lay down any principle to cover every case. Generally speaking payments are capital payments only if they are made to acquire a capital asset or to extinguish a capital liability. *Rye & Eyre* v. *Inland Revenue Commissioners* (6) is another case of a lump sum paid in advance, and it was never

(1) (1927) 11 Tax Cas. 730.
(2) (1929) 14 Tax Cas. 769.
(3) (1932) 17 Tax Cas. 272.
(4) [1936] 1 All E. R. 535.
(5) (1936) 154 L. T. 484, 487.
(6) [1935] A. C. 274.

suggested that this prevented its being an income payment. Therefore while reliance is placed on the actual words of r. 19, sub-r. 2, and r. 21, it is contended that apart from the words of those rules, any payment for the user of a patent is necessarily an income payment.

[SIR WILFRID GREENE M.R. The payments here are not solely for the licence to use the patent in the particular territory, for the patentees covenant not to use it in the area.]

The payments are for an exclusive licence, that is, an exclusive right of user. It can make no difference whether the licence is or is not exclusive. The test is whether the patentee parts with his property in the patent or grants a licence to use it.

Raymond Needham K.C. and *F. Alan Martineau* for the company. *Mills* v. *Jones* (1) in no way differed from *Constantinesco's* case (2) in view of the finding of the Commissioners that the future user of the patent was negligible. Those were cases where the lump sum was arrived at on a calculation of the royalties properly payable. But Greer L.J. in *Mills* v. *Jones* (3) does not exclude the possibility of an agreement under which a lump sum payment is not made in respect of royalties. In each case of a licence the Court has to decide whether the payment is for user of the patent or for something else, and in the case of an exclusive licence payment is only in part for the licence and in part for the covenants insuring its exclusive user in the particular territory. Further, every agreement must be looked at to see what is meant by the term " royalty." When the agreement in this case is considered it is clear that the payment of 25,000*l.* is to be made whether there is any user of the patent or not. The main value of an exclusive licence may be the right it confers to prevent any one else using the patent.

Further, this assessment is made under r. 21 of the All Schedules Rules, which is a machinery rule. Nothing can be brought into charge under r. 21, which has not been brought into charge by the charging provisions in the Income Tax Act.

(1) 14 Tax Cas. 769.
(2) 11 Tax Cas. 730.
(3) 14 Tax Cas. 769, 783.

INLAND REVENUE COMMISSIONERS *v.* BRITISH SALMSON AERO ENGINES, LD.

The provisions as to user of patents in rr. 19 and 21 of these Rules and in r. 3 (*m*) of the Rules applicable to Cases I. and II., which prohibits the deduction from profits or gains of any royalty or other payment made in respect of the user of a patent, originally became law as s. 25 of the Finance Act, 1907, which was held in *Lanston Monotype Corporation, Ld.* v. *Anderson* (1) to be merely a machinery rule for facilitating the collection of tax charged under the charging provisions of the Act. That being so, r. 21 must be construed as not bringing into charge anything not in the charging words of the Act. Royalties or other sums paid for the use of a patent do not extend in meaning beyond something in the nature of royalties.

The letters referred to in the Case assist the view that the so-called royalties stand on the same footing in the agreement as the lump sum payment, for in the negotiations the consideration for the exclusive licence that was suggested was 50,000*l.* That amount is made up in the agreement by 25,000*l.* payable in three instalments and a yearly payment making up another 25,000*l.* The Court is entitled to have regard to matters outside the agreement in deciding whether the payments provided for are capital or income: *Perrin* v. *Dickson* (2) and see also *Mills* v. *Jones.* (3)

The Crown is wrong in thinking that r. 21 makes payments for the use of a patent necessarily income payments, for it, like s. 25 of the Finance Act, 1907, is not a charging section, and nothing could be treated as chargeable with tax under s. 25 that was not chargeable with tax before the Act of 1907 was passed. That being so, the question is at large whether any payment for the use of a patent is a capital or income payment, and only the income payments are chargeable. That question turns entirely on the particular facts.

[SIR WILFRED GREENE M.R. referred to *MacTaggart* v. *Strump.* (4)]

Here what was acquired under the agreement was a capital asset. The suggestion that the lump sum of 25,000*l.* was a trading debit could not be maintained, and the second class of

(1) [1911] 2 K. B. 1019.

(2) [1929] 2 K. B. 85; [1930] 1 K. B. 107; 14 Tax Cas. 608.

(3) 14 Tax Cas. 769.

(4) (1925) 10 Tax Cas. 17.

payments does not really differ from the lump sum payment. The consideration was 50,000*l.*, and the particular payments were merely a method of effecting this total payment. Cases dealing with this matter are *Inland Revenue Commissioners* v. *Ramsay* (1) and *Dott* v. *Brown* (2), which gathers up the cases dealing with this question of capital or income payments.

Sir Donald Somervell A.-G. in reply.

(SIR WILFRID GREENE M.R. We need not trouble you on the cross-appeal. The first question is whether the Finance Act, 1907, s. 25, was a charging section.]

[CLAUSON L.J. It is not open to this Court to treat it as other than a collecting section.]

The position of the section as it is divided up in Rules applicable to Cases I. and II. of Sch. D, r. 3 and rr. 19 and 21 of the All Schedules Rules affects the construction in the Act of 1918. It is contended that Parliament intended thereby to make it clear that a payment for the use of a patent was necessarily an income payment; compare *Constantinesco's* case (3) and *Mills* v. *Jones*. (4)

SIR WILFRID GREENE M.R. These two appeals arise out of five assessments to income tax made on British Salmson Aero Engines, Ld., under r. 21 of the General Rules. The assessments were in respect of certain payments made by the taxpayer, the company—I will call it "the English company"—under an agreement of October 25, 1929. It appears that the English company was incorporated shortly before that agreement was executed for the purpose of entering into it, the object of the agreement, and of the incorporation, being to acquire the sole licence to manufacture and sell in the United Kingdom of Great Britain and Ireland and its Dominions, Colonies, and Dependencies the aeroplane engines made by a French company, the other party to the agreement, called Société des Moteurs Salmson of France. The agreement provides for certain payments to be made by the English company to the French company, and it is in respect of those payments that the assessments now under consideration were made. The agreement, which was in the French language, provided that its object was to grant to the licensees—that is, the English company—the exclusive right for the period of ten years from October 25, 1929, until October 24, 1939, to construct, use, and sell in the territory which I have mentioned certain Salmson aero engines. Then there were certain other provisions of the agreement to which I must just refer. Provision is made for the free use of certain patents in use in the types of engines described, and article II. provides: "As consideration for the licence thus granted to them the "Licensees shall pay to the Constructors"—that is, the French company—"the sum of 25,000*l.*, payable as follows: "15,000*l.* on the signing of this agreement, 5000*l.* six months "after the signing of this agreement, 5000*l.* twelve months "after the signing of this agreement. There shall be paid in "addition to the foregoing payments and as royalty 2500*l.* "twelve months after the signing of this agreement, and a "like sum each twelve months during the following nine "years." The payments are to be made at an address in Paris.

---

(1) (1935) 20 Tax Cas. 79, 90.
(2) (1936) 154 L. T. 484.
(3) 11 Tax Cas. 730.
(4) 14 Tax Cas. 769.

Article III. provides for the French company giving to the licensees necessary information and help, and under it they undertake to disclose improvements. That, of course, is a common form of obligation in agreements of this kind. Article IV. contains a provision by which the French company agree to maintain the patents in England, and in the event of infringement the French company and the licensees agree to take all necessary proceedings to protect the patents and prevent any infringements.

Article V. gives the licensees power to grant sub-licences. Article VII. provides: "The Constructors shall not during "the life of this agreement manufacture or sell directly in the "countries granted to the Licensees any engine of the above "mentioned types, or any of the subsequent improvements," and there is a corresponding undertaking by the English company not to go outside its own territory. I do not think that there is anything else to which I need refer except that there is an arbitration clause providing for arbitration in

France. The agreement is expressed to have been made in Paris on October 25, 1929.

By that agreement payments were made by the English company to the French company. The payments were not made out of profits brought into charge, and, accordingly, if the Crown is right in its contention that these payments are payments in respect of which, as such, tax is chargeable, the position was, under r. 21 of the General Rules, that the company was bound to deduct a sum representing the amount of tax, and was bound to account for it to the Revenue. On the face of the agreement the payments to be made under it in terms fall under two heads: one is what is expressed to be consideration for the licence granted, a lump sum of 25,000*l.* payable in specified instalments; the other is what is described as an additional payment as royalty of 2500*l.* a year.

The Special Commissioners, on appeal to them, decided in favour of the company with regard to the first of those two classes of sums. Those sums, they held, were instalments of the capital sum of 25,000*l.*, whereas the sums under the second class, they held, were sums paid in respect of the user of the patent, and the appellants were assessable in respect thereof under r. 21 of the Rules applicable to All Schedules. Both the Crown and the company appealed to the King's Bench Division. Finlay J. affirmed the decision of the Commissioners, and both sides appeal to this Court.

In my opinion, the Commissioners and Finlay J. came to a right conclusion. The argument for the Crown is based on the language of r. 21, which provides: "Upon payment of "any interest of money, annuity, or other annual payment "charged with tax under Schedule D, or of any royalty or "other sum paid in respect of the user of a patent, not "payable, or not wholly payable out of profits or gains "brought into charge, the person by or through whom any "such payment is made shall deduct thereout a sum repre"senting the amount of the tax thereon at the rate of tax "in force at the time of the payment." The words on which the Crown relies are "royalty or other sum paid in respect of

C. A.
1938

INLAND REVENUE COMMISSIONERS *v.* BRITISH SALMSON AERO ENGINES, LD.

Sir Wilfrid Greene M.R.

"the user of a patent." Both classes of sums, they say, were paid in respect of the user of a patent, and they contend that the effect of this language is that, whether or not a sum paid in respect of the user of a patent is in reality of a capital or of an income nature, the language of the Legislature has definitely attributed to it the latter characteristic for tax purposes. Another way in which the argument is put is that any sum paid in respect of the user of a patent, whether it be called a royalty or not, and whether it be a lump sum or not, is of necessity stamped with the character of income because it is paid in respect of user.

Before I come to examine the argument a little more closely, and the authorities on which reliance is placed, there are one or two matters with regard to the agreement itself which must be borne in mind. The first thing to notice about it is that it is not merely an agreement under which the English company receives the right to use a patent. By this agreement the English company is entitled to restrain the patentees themselves from exercising the patent in the territory, and they are entitled to call on the patentees to take steps to prevent others exercising the invention within the territory. Those rights are, to my mind, in essence different from the mere right of user. A licensee under a patent is a person who is put into such a position that the patentee disentitles himself to complain of what would otherwise have been an infringement. That is all a patent licence is. On the other hand, where the patentee undertakes himself not to exercise the invention, that is something quite different. He is restraining himself by a covenant or contract from exercising his monopoly rights, and, further, if he undertakes to prevent others from infringing his monopoly rights, he is giving an undertaking which also in its nature is quite different from what is given by a patent licence, which in effect is an undertaking not to complain of what would otherwise have been an infringement. I merely mention that fact as one of the circumstances in this case to which it is necessary to have regard.

The other circumstance to which I wish to call attention is this. There is in the article relating to payment a fundamental difference in the nature of the two classes of sums, in this sense, that the former class starts off by being a lump sum payment, definite and fixed, which is then to be payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is, on the face of it, nothing but an undertaking to pay yearly sums as royalty. Speaking quite apart from any close examination of authority, and simply regarding the distinction between those two things, it would appear on the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate. I should have found it very difficult, in the face of so strong an indication as that, to appreciate an argument which said that those sums were not in the nature of income payments. They do not start from a capital sum which is afterwards split up into instalments. Their existence from beginning to end is an annual existence and nothing else, and the parties have indicated what, to their minds, is the nature of that annual payment.

Here I may get rid of one point which has emerged in the course of the argument. There were before the Commissioners certain letters written between the parties before the agreement was executed. Those letters suggest, at any rate at the time when they were written, that the proposal was that there should be a lump sum of 50,000*l.* payable by instalments, which would have corresponded with the payments to be made under this agreement. Nothing that I say must be taken to be expressing the view that, in ascertaining the answer to the question whether or not a payment is to be regarded as a capital or an income payment, it is illegitimate to look outside the terms of a contract. I do not wish to lay down any such proposition. What has to be ascertained in these cases is the true nature of a payment; that is to say, the true nature from an accountancy point of view, and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matters which may properly be looked into in answering that question

C. A.
1938

Inland Revenue Commissioners v. British Salmson Aero Engines, Ld.

Sir Wilfrid Greene M.R.

of fact. On the facts of this particular case I take the view that the Commissioners were right when they said that those were documents which they could not look at, but for this reason, that those documents are not documents which resulted in the creation of a lump sum liability of 50,000*l.* at all. It may have been the intention of the parties when those letters were written, and it seems likely that it was, that they should first of all create a lump sum obligation and then provide for it by payment by instalments. If they did that, the agreement shows us on its face that they subsequently changed their minds, because instead of adhering to that scheme they have deliberately, as we must assume, divided the payments into two categories differently described. I make those observations in order to explain the reasons why, in my opinion, the cross-appeal of the taxpayer must be dismissed. I agree with the views of the Commissioners and of the learned judge on that matter. I have said what I have said with regard to it on the assumption that the question whether a sum is a capital or an income payment is one which may legitimately be inquired into, and, indeed, must be inquired into, in cases of patents.

That brings me to the substantial matter raised by the Crown's appeal. Before I come to it in a little more detail it is necessary to remember what is the history of this particular reference in r. 21 and the corresponding reference in r. 19 of the General Rules to royalties or other sums paid in respect of the user of a patent. They have their complement in r. 3 of the Rules applicable to Cases I. and II. in para. (*m*), under which, in computing the amount of the profits or gains to be charged, deductions are prohibited in respect of "any royalty "or other sum paid in respect of the user of a patent." The scheme, therefore, is that, where a business is being carried on with the use of patents in respect of which royalties or other sums fall to be paid, the person carrying on the business, in computing his profits, cannot deduct the sums in question. On the other hand, he is entitled under r. 19, and bound under r. 21, when he comes to make the payment, to deduct the tax. Although it now appears broken up into two parts of the Act of 1918, it originated in s. 25 of the Finance Act, 1907. That section prohibited such a deduction in calculating profits and gains, but authorized the person paying to deduct tax when he paid. It is not suggested on behalf of the Crown that the position since the Act of 1918 is in any way different with regard to the matters with which we are concerned from what it was under s. 25 of the Act of 1907. The re-arrangement under the Act of 1918 has not affected the law.

Sect. 25 came up for consideration before this Court in *Lanston Monotype Corporation, Ld.* v. *Anderson*. (1) The question there arose in a rather special and indirect manner. I need not go into the details of that case showing how the question arose. The important matter for the present purpose is that in deciding that case and, as I read the judgments, as an essential step in the reasoning which led to the decision, the Court of Appeal, or at any rate two members of it expressly, and the Master of the Rolls impliedly, I think, took a view which I find most conveniently expressed in the language of Farwell L.J. (2): "I think it is plain that this is a section "for the improvement of the machinery for collecting the "tax, and not a charging section at all, and that, on the true "construction of it, the words 'any royalty or other sum paid "'in respect of the user of a patent' are necessarily confined "to the royalty or sum which is spoken of two lines below, "on making payment of which the person paying is entitled "to deduct." Kennedy L.J. in a reference to the judgment of Hamilton J. (who had, as I read his judgment, negatived that view), takes the same view as Farwell L.J. The Master of the Rolls disagrees with the conclusion to which Hamilton J. had come. That case being in the reports when the Legislature in 1918 codified the Income Tax Acts, it seems to me that we must assume that it codified them with the law as so declared in its mind, and with no intention that the law as expressed in that judgment should in any way be altered. Accordingly, I start the examination of this question by basing myself on the proposition that s. 25 of the Act of 1907 did not alter the law by bringing into charge to income tax a subject-

(1) [1911] 2 K. B. 1019.
(2) Ibid. 1022.

Sir Wilfrid Greene M.R.

matter which, previously to the passing of that section, would not have been charged.

Income tax, as has been said over and over again, is a tax on income. It does not tax capital. As the corollary to that, in ascertaining profits, payments of a capital nature may not be deducted. It is income all the time which has to be considered under the Income Tax Acts, and when I find that in s. 25 the Legislature in terms prohibits deductions on account of any royalty or other sum in computing profits, I can only read that as meaning that they are prohibiting a class of deduction in the ascertainment of profits, which, but for such prohibition, would have been legitimate; that is to say, a class of deduction which was of an income, as distinct from a capital, nature. Similarly, the direction to the person paying the royalty or sum to deduct, or giving the authority to deduct, the tax relates to royalties or sums of the same character, that is to say, sums of an income nature. Nobody is going to dispute that the general type of payment there described, "royalty or other sum paid in "respect of the user of a patent," is of an income nature. And payments of that kind, in the common form, of a royalty per machine, or so much based on turnover, and so forth, common commercial payments, are unquestionably of an income nature. But I am unable to read this machinery enactment, which was enacted merely for the purpose of altering the method by which the tax should be collected, as being something which brings into charge something of a capital nature which otherwise would not have been chargeable.

There were in 1925, and there have been since, many cases where this matter of capital or income has been debated. There have been many cases which fall on the border-line. Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons. But that class of question is a notorious one, and has been so for many years.

I am unable to read this legislation as deciding that class of problem in the matter of patents once and for all by declaring in some way that every payment in respect of the user of a patent must of necessity be of a capital nature. I not only cannot extract any such proposition from the language of the section, but I entirely fail to find any such proposition asserted in the authorities to which we have been referred. It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains, in respect to any particular payment: Is it capital or is it income? and that question has to be decided, as it has to be decided in reference to other subject-matters, on the particular facts of each case, including in those facts the contractual relationships between the parties. It has been said that the question is one of fact, and it is, when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, it does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract is of itself the really decisive matter in answering the question. In this case the question of the contract and the terms of the contract is of cardinal importance, as I have already endeavoured to indicate in saying what I have said on the question of the cross-appeal.

In support of the Crown's argument that a payment in respect of the user of a patent must of necessity be of an income nature, and that that is in any case what the Legislature has enacted, the authorities relied on begin with the well known case of *Constantinesco* v. *R.* (1) That was a case where the patentee had an award made in his favour by the Royal Commission on awards to inventors. The only jurisdiction which that commission had, at any rate so far as that case was concerned, was to settle the terms of user by the Crown of the patentee's patent, which otherwise would have fallen to be decided under s. 29 of the Patents and Designs Act, 1907. That section provided that any Government department might "use the invention for the services "of the Crown on such terms as may, either before or after

(1) 11 Tax Cas. 730.

"the use thereof, be agreed on, with the approval of the "Treasury, between the Department and the patentee, or, in "default of agreement, as may be settled by the Treasury "after hearing the parties interested."

One of the functions of the Royal Commission was to settle the amount of payment in lieu of having it settled by the machinery laid down by that section. But the only matter with which they had to concern themselves was the terms of user. In *Constantinesco* v. *R.* (1) the user had taken place before the terms were settled. The claimant, Mr. Constantinesco, had put forward a claim for a royalty, based on 10*l.* per gear manufactured on behalf of the Government. In point of fact, he received a lump sum award, which began with the expression: "The Commission have "settled the terms of user of this invention as follows" and they awarded him 50,000*l.* and 20,000*l.*, making 70,000*l.* It was as clear as anything ever could be that the Government had, in fact, used the patent. They had manufactured a number of gears. The consideration to be paid or the award to be made in respect to that user had to be settled after the event. It could have been settled on the basis of so much a gear; it could have been settled on the basis of a lump sum. To say that some difference for tax purposes would result, according to whether the Commission awarded a lump sum or awarded so much per gear, or took the aggregate sum which the inventor was claiming on the basis of so much per gear and reduced it by half, leaving it as a lump sum, appears to me, if I may humbly say so, as preposterous as it appeared in that case to Lord Dunedin. Differences of technique of that kind could not alter the substantial nature of the payment. But be it observed that the decision in that case was not based on any such broad proposition as that for which the Crown now contends. It would have been sufficient, if the Crown were right, to say: "This is in respect "of the user of a patent." That was the ground for making payment under s. 29 of the Patents and Designs Act, that was the matter in respect of which the Royal Commission had jurisdiction to make an award. That was the matter in respect to which it did make an award. Therefore, it would have been sufficient to say that that concluded the whole matter, because the Legislature, as the Crown now says here, has asserted that every sum paid in respect of the user of a patent is of necessity of an income nature. But there was no such approach to that case, either in the Court of Appeal or in the House of Lords. It is sufficient just to look at the passage in Lord Cave's speech, which is particularly relied on by the Crown. He said (1): "My Lords, three points "are raised on behalf of the appellant. First, it is said, "that the sum of 70,000*l.* was not annual profits or gains "within the meaning of the Income Tax Act but was the "payment of a capital sum." There the point emerged as neatly as any point could. If the Crown are right it would have been sufficient for Lord Cave to say: "The short "answer to that argument is that it was in its nature and "of necessity an income payment, being a sum paid in "respect of the user of the patent." But what did he do? He proceeded to examine the circumstances of the case in order to disprove the appellant's contention. First of all, he noted the period over which the invention was to be used, for which the payment was made. Then he said: "The claim put in was a claim as for royalty in respect of "the successive uses of the invention." There he was referring to the claim, which was a claim for successive uses, that is to say, for each gear manufactured. That was what Lord Cave was quite obviously referring to as "successive uses." He then referred to the practice of the Commission "to take "as a basis of their award a fair royalty as between a willing "licensor and a willing licensee," and he said that he had no doubt that that basis was accepted. Then he stated, not as a necessarily determining factor, but as one of the facts in the case, that the corpus of the patent was not taken away from the appellant. And then he said: "In view of "all the facts"—that is to say, the facts which he had very summarily stated—"I am satisfied that the sum awarded

---

(1) 11 Tax Cas. 730.

---

(1) 11 Tax Cas. 745.

C. A.
1938

INLAND REVENUE COMMISSIONERS v. BRITISH SALMSON AERO ENGINES, LD.

Sir Wilfrid Greene M.R.

"is to be treated as profits or gains, and annual profits or "gains, within the meaning of the Income Tax Act." I find great difficulty in understanding how it can be said, in the light of that passage and that reasoning, directed as it was to the specific argument that the sum was a capital sum, and resulting in the conclusion, based on an examination of the facts, that it was not a capital sum, but was annual profits and gains, that that case is an authority for the proposition that the matter is concluded once and for all, once it is asserted of a payment that it is a payment in respect of a user of a patent. I cannot appreciate myself how any such argument as that can really stand.

The next case of importance relied on is the Mills bomb case, reported under the name of *Mills* v. *Jones*. (1) There an award had been made to an inventor. The only point of difference between that case and *Constantinesco* v. *R*. (2) was that the actual award itself awarded a lump sum "in respect of all user past, present and future, by or for "the purposes of H.M. Government (including user by way "of selling for use, licensing or otherwise dealing") with the Mills bomb. The inclusion of the future, whether it was within the jurisdiction of the Royal Commission or not, was agreed on by the parties. The General Commissioners of Income Tax found as a fact that the amount included in respect of future user was negligible. An attempt was made to distinguish that case from *Constantinesco* v. *R*. (2) The way in which the argument was put is most conveniently stated in the speech of Lord Buckmaster, who said (3): "The real ground upon which the appellant complains of "those judgments"—those are the judgments of Rowlatt J. and of the Court of Appeal—"is this: He says that the "award itself shows that part of the sum was in effect "payment for the right to use the invention for the future, "which means that there were capital monies involved in the "37,000*l*. which are in no way distinguished, from the income, "and that, as they have not been distinguished, and cannot

---

(1) 14 Tax Cas. 769.
(2) 11 Tax Cas. 730.
(3) 14 Tax Cas. 786.

"at present be distinguished, a surcharge cannot properly "be made for the total sum and, consequently, the surcharge "was wrong and ought to be discharged." The taxpayer, therefore, was saying there: "This is a sum which contains "in it a capital element, in that part of it is attributable "to future user. You cannot disintegrate it and say how "much is referable to each kind of user, and, therefore, you "cannot tax any of it." I suppose it might also have been said that there must be some sort of apportionment claim on some basis. That was the case which was being put there. That was the distinction which was attempted to be drawn between that case and *Constantinesco* v. *R.* (1)

It is said that the Court of Appeal, in its judgment in *Mills* v. *Jones* (2), decided against the claimant on the ground now asserted by the Crown, that any payment in respect of the user of a patent, be it past user or be it future user, be it a lump sum or be it a lump sum payable by instalments, or whatever form it takes, is of necessity an income payment. Expressions in the judgment of Greer L.J. are relied on in support of that argument. I am quite unable to extract from the judgments in the Court of Appeal any such sweeping proposition. The language used must be construed in reference to the particular facts of that case and the particular arguments which were being there put forward. I cannot agree that the paragraph on which so much reliance is placed is one which bears anything like the construction which is sought to be placed on it. Greer L.J. himself, in a later passage, was quite clearly keeping open, to put it at the lowest, the case of exclusive licence, because he said so in terms. He drew a distinction between the ordinary licence to use and an exclusive licence. I venture to think that there is a very good ground for that distinction, because, as I have already pointed out, directly an exclusive licence is granted it comes into a category of right different altogether from that of a mere right of user. However that may be, the fact that Greer L.J. guarded himself in that way makes it impossible for me to treat what he said as laying down some general proposition as sweeping

(1) 11 Tax Cas. 730.

(2) 14 Tax Cas. 769.

as the Crown would suggest that it is, and in particular as laying down a proposition which would govern a case where one of the relevant facts is that the licence is an exclusive one.

I am fortified in that attitude towards that case because I find that, when the matter went to the House of Lords, they did not deal with it in the way in which they could have dealt with it, and ought to have dealt with it, if the Crown's contention here be right. Lord Buckmaster, who delivered the leading opinion, instead of answering the question which he formulated, as I have already said, in the short way in which it could have been answered, proceeded to base his decision on the findings of fact of the Commissioners that the amount of future user included in the payment was negligible. He, therefore, treated it as being a sum which could be disregarded: that is to say, there was nothing left in the point that, wrapped up in that award, there was an element of a capital nature, because that capital element was a negligible element, and, therefore, could be disregarded. The speech of Lord Buckmaster was far from asserting the proposition that every payment in respect of the use of a patent must necessarily be an income payment.

I may also refer to this circumstance. Lord Dunedin agreed with Lord Buckmaster's opinion and added this, which I venture to think is significant: "I think the finding "of fact is conclusive." What Lord Dunedin ought to have said, according to the Crown's present argument, was that as a matter of law the Commissioners were bound to find against the claimants. But instead of that, both of those noble and learned Lords (and the other noble and learned Lords, Viscount Sumner, Lord Blanesburgh, and Lord Atkin, agreed without delivering any opinions of their own) treated the decisive matter not as a matter of law, as to which the Commissioners were bound to decide in a particular way, but as a matter of fact, with regard to which their finding of fact was final and binding on the House. That being so, it seems to me that there is nothing to prevent the Commissioners in the first place, or the Court, from examining the facts in the case of a payment made in respect of a royalty and saying what its true nature is. If the answer is that its true nature is that it is a capital payment, then that is equivalent to saying that it is not chargeable with tax.

I do not propose to add anything by way of expression of my own views on the principles on which that question ought to be determined. It is a question which has been investigated very carefully in a number of different connections, and different matters of fact have been regarded in different cases as of importance and of weight. It seems to me, on all the facts of this case, including the terms of the contract itself, which is the important and, indeed, the essential fact in the case, that the Commissioners were perfectly entitled to come to the conclusion to which they did—namely, that this class of payment was not of an income nature, but of a capital nature. I can find nothing in the facts of the case, or in the construction of the documents, which would justify me in saying that the Commissioners' conclusion is wrong in law. In my judgment their conclusion is the right one.

There is one further matter which I should mention. In *Constantinesco* v. *R.* (1) Rowlatt J. had said, as in the similar case of annuities, and so forth, so in the case of a patent, that there may be a lump sum payment which would not be an income payment, but would be a capital payment. He summarized very succinctly the familiar class of principle which applies to the determination of those matters. It is said that Rowlatt J. in that respect had wrongly appreciated the Income Tax Acts so far as they relate to patents. I do not propose to examine what he said. One may find, perhaps, somewhat loose language in a very concise statement, which might be thought possibly to go a little too far, or be too comprehensively expressed. It would not serve any useful purpose to examine those statements. In my opinion, subject to any closer examination of their language, they refer to a principle which is just as much applicable to a payment in respect of a patent as it is in respect of other subject-matters—namely, that if the payment, when its true nature

---

(1) 11 Tax Cas. 730.

C. A.
1938

Inland Revenue Commissioners
v.
British Salmson Aero Engines, Ld.

is looked at, is not an income payment, but a capital payment, it is not chargeable to tax. But that question is to be answered on the facts of each particular case. Rowlatt J. did not intend to go further than that. But quite apart from that matter, for the reasons which I have given, I have come to the clear conclusion which I have stated, and, therefore, both the appeals must be dismissed with costs.

Scott L.J. I agree with the conclusion arrived at by the Master of the Rolls, and with the whole of the reasoning of his judgment; and I do not propose to add anything on the general principles which he has discussed.

But there is one particular aspect of the case upon which I think it may be useful to add a word; and that is the value to be attached in this Court to the impressions of the Commissioners, when they heard the appeal in the first instance. They have decided that the first three payments in question were capital payments. How far ought we, on the facts of this case, to be guided by that finding, or even feel bound by it? The rule as to the position of a Court of Appeal, on a Case stated in regard to the point whether the decision of the Commissioners was upon a question of fact into which the Court cannot inquire, or upon an issue involving a question of law, into which the Court can inquire, was dealt with very fully by Hamilton J., as he then was, in the case of *American Thread Co.* v. *Joyce* (1), in a passage which was subsequently approved both in the Court of Appeal and in the House of Lords. The gist of what he said was, I think, that where the Commissioners have put before the Court in the special case the whole of the materials from which they drew their final inference, then it is a question of law as to whether, from that material, their inference was correct or not. But that formulation of the rule seems to me subject to a qualification, which I do not think that Hamilton J., or the other Courts who agreed with him, intended in any way to exclude. Where the Special Commissioners are skilled persons in matters of business, if, on an analysis of the business arrangements out

(1) (1912) 6 Tax Cas. 1.

C. A.
1938

INLAND REVENUE COMMISSIONERS
v.
BRITISH SALMSON AERO ENGINES, LD.

Scott L.J.

of which the case has arisen, they come to the conclusion, as business men, that a particular payment has what my Lord has called the accountancy quality of a capital payment or, on the other hand, of an income payment, that is a view to which, in my opinion, the Court is entitled and ought to give great weight. The position is analogous to the case of a trial in the Commercial Court before a City of London Special Jury, on a question of business and keeping of accounts, where the Special Jury have expressed a view on the issue whether a particular payment is a capital payment or an income payment. In such circumstances, the Court ought to be very slow to disagree with such a skilled opinion.

In my view, that kind of weight ought to be attached to the findings of the Commissioners in the present case. It is quite true that they put before us the whole of their material; and that that material in substance consists of an agreement made between the licensees and the patentees, and nothing more. But they have taken the view, without hesitation, evidently, that these lump sum payments were in the nature of capital payments. If there were any doubt from the purely legal point of view, which I do not think there is, that opinion of the Commissioners ought to weigh in the balance; and in my opinion is an additional reason for upholding their findings.

CLAUSON L.J. For the reasons stated by the Master of the Rolls, and supplemented by Scott L.J., with which I agree, I concur in the order which is proposed.

Solicitors: *Solicitor of Inland Revenue; A. J. Adams & Adams.*

H. C. G.

C. A.

1938

March 17.

TRIM *v.* STURMINSTER RURAL DISTRICT COUNCIL.

Housing—House suitable for occupation by persons of the working classes—Small dwelling-house with adjoining land—"House"—Land whether an "appurtenance" of house—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 11, 15, 188, *sub-s.* 1.

The Housing Act, 1936, s. 188, provides: "(1.) In this Act, "unless the context otherwise requires— . . . . 'House' includes "any yard, garden, outhouses, and appurtenances belonging "thereto or usually enjoyed therewith."

A cottage and ten acres of adjoining grass land belonging to the same owners were for a number of years let together, formerly to a dairy farmer and now to a poultry farmer. The local authority, regarding the cottage as a house of a type suitable for occupation by persons of the working classes, but being satisfied that it was unfit for human habitation and not capable at a reasonable expense of being rendered so fit, made a demolition order under s. 11 of the above Act in respect of it.

On an appeal by the owners against the demolition order, the county court judge, being of opinion that the cottage and the ten acres of land together constituted the "house" within the statutory definition, and that such a house was not suitable for occupation by persons of the working classes, made an order quashing the demolition order.

On appeal by the local authority against the order of the county court judge:—

Held, by the Court of Appeal:—

That it was not the cottage together with the whole of the ten acres of land, but only the cottage with its outhouses, yards, curtilage and gardens, that constituted the "house" within the definition, inasmuch as the term "appurtenances" was there used in its well established legal sense as including only such matters as outhouses, yards and gardens, and not land as meaning a corporeal hereditament.

That the question exactly how much of the ten acres ought to be included in the appurtenances of the cottage and therefore in the "house" was one for the decision of the county court judge, his decision to be confined, however, to considerably less than the whole of the ten acres;

That the question whether the house as thus defined was suitable for the occupation of the working classes was also one for the county court judge;

That, when the county court judge had decided these questions, it would then be for him to decide whether or not a demolition order should be made in respect of the house; and

That the case should be remitted to the county court judge with a direction to consider and decide these questions in the manner indicated.

Bryan v. *Wetherhead* (1625) Cro. Car. 17, followed.

C. A.
1938

TRIM
v.
STUR-MINSTER
R. D. C.

APPEAL from His Honour Judge Cave sitting in the County Court of Dorsetshire holden at Blandford.

By a conveyance dated February 26, 1937, the then owner conveyed to Mrs. Trim and Mr. William Titford, for the consideration therein mentioned, a cottage, garden and orchard situate at Dirty Gate, Sturminster Newton, in the county of Dorset, and also certain adjoining pasture land containing about ten acres, to hold to the purchasers as joint tenants in fee simple.

All these premises had for years been let together on a yearly tenancy at a rent of 30*l*. a year, down to the end of 1936 to a dairy farmer and thereafter to a poultry farmer.

On June 16, 1937, the Sturminster Rural District Council, who were the local authority under the Housing Act, 1936, being satisfied on a report from one of their officers that the house was of a type suitable for occupation by persons of the working classes, was unfit for human habitation and was not capable at a reasonable expense of being rendered so fit, and having in other respects followed the procedure prescribed by s. 11 of the Act, made an order purporting to be a demolition order under sub-s. 4 of that section, directing that the house be vacated within 365 days from the date on which the order became operative, and that it be demolished within six weeks after the expiration of that period.

The owners of the house gave notice of appeal dated July 7, 1937, to the county court against the demolition order.

On October 27, 1937, the county court judge, having heard evidence in support of the facts above stated, made an order quashing the demolition order on the ground that he was not satisfied that the premises were a house suitable for occupation by persons of the working classes within the meaning of the Act.

The local authority gave notice of appeal dated November 15, 1937, to the Court of Appeal to have the order of the county court judge set aside, or in the alternative a new trial directed; the grounds of appeal being that the judge misdirected himself in holding (*a*) that the premises were not a house which is occupied or of a type suitable for occupation by persons of the working classes within s. 11 of the Act of 1936, (*b*) that in determining whether the premises were of a type suitable for occupation by persons of the working classes he was entitled to treat the ten acres of land and certain buildings as included in such house, (*c*) that in determining whether the premises were a house of a type suitable for occupation by persons of the working classes he was entitled to take into consideration the fact that the ten acres of land and buildings had been let together with the said premises; (*d*) that the said premises were a farm house and by reason thereof were not of a type suitable for occupation by persons of the working classes.

When the case first came before the Court of Appeal it did not appear upon what principle the county court judge had come to the conclusion that the premises were not a house suitable for occupation by persons of the working classes, and the Court, therefore, sent the case back to the judge with a request that he would state the reasons for his decision.

In compliance with that request of the Court of Appeal the learned county court judge accordingly made the following statement:—

"The particulars of my findings and reasons for my decision "in granting the order quashing the demolition order herein "dated June 16, 1937, are as follows:—

"The premises in question are a small dwelling-house of "about six rooms situate at Dirty Gate, Sturminster Newton, "in the county of Dorset. Appurtenant to the house, and "at all material times occupied therewith, are ten acres of "grass land, cowstalls capable of accommodating a dozen "cows, and other farm buildings. All these premises have "for years past been let together upon a yearly tenancy at "a rent of 30*l.* per annum: formerly to a person carrying "on the business of a dairy farmer, latterly to a person carrying "on the business of a poultry farmer. It was contended on "behalf of the appellants [the owners] that the house was "not occupied, or of a type suitable for occupation, by persons "of the working classes, within the meaning of the Housing

C. A.
1938

Trim
v.
Sturminster
R. D. C.

"Act, 1936, s. 11. I did not understand the contention of "the respondents [the local authority] to be that the house "was, or ever had been, occupied by 'persons of the working "'classes.' I understood the contention to be that the house "was 'of a type suitable' for occupation by such persons: "and that in deciding whether that was so or not, I ought "to have regard only to the size of the house itself. That "argument seemed to me to be inconsistent with the definition "of 'house' in s. 188 of the Act. There is not, in this section, "any definition of working classes; but there is one in "Sched. II., par. 2 (*e*) 'for the purposes of this Schedule.' "As I am not myself aware of the existence of any classes "the members of which all work, as opposed to classes none "of the members of which work, I applied the meaning given "in the paragraph of the Sched. to the expression 'working "'classes' in the body of the Act. I took the view that no "persons of the working classes, as so described, would either "take this house and its appurtenances on an annual tenancy, "or be accepted as tenant by the owner. I therefore decided "that this house was not 'suitable for occupation by persons "'of the working classes' within the meaning of the Act; "that it was not therefore subject to the operation of the "Act; and the respondents [the district council] had no "power to make a demolition order; and consequently "quashed the order."

On March 17, 1938, the appeal was finally heard by the Court of Appeal.

H. Heathcote-Williams for the local authority, appellants. The learned county court judge was wrong in quashing the demolition order on the ground that the respondents' house was not a "house . . . . suitable for occupation by persons "of the working classes" within the meaning of the Housing Act, 1936, in respect of which such an order might be made. He came to that conclusion because he misunderstood the meaning of the word house in this connection and erroneously supposed that the respondents' house comprised not only the building and its immediate surroundings, but also the ten

C. A.
1938

Trim
v.
Sturminster
R. D. C.

acres of pasture land which were let along with it. The respondents' house does not include that piece of land. The word house taken by itself is an ambiguous word having no perfectly fixed and definite meaning, and where it occurs in a Statute it may be necessary to look at the context in order to discover in what sense the Legislature has used it: *Grant* v. *Langston* (1); *Lewin* v. *End* (2); and *B. Aerodrome, Ld.* v. *Dell.* (3) In the Housing Act, 1936, it is plain from the contexts in which the word house is used that it means a building suitable for occupation as a dwelling. Thus, s. 11, which is one of the most important sections of the Act, provides that where a local authority are satisfied that "any "house which is occupied, or is of a type suitable for occupation "by persons of the working classes is unfit for human "habitation" then the consequences there mentioned are to follow. This view is also borne out by the definition of the word house provided for the purposes of the Act in s. 188, sub-s. 1—namely: "'House' includes any yard, garden, "outhouses, and appurtenances belonging thereto or usually "enjoyed therewith." If the word appurtenances be excluded from it, that definition plainly means the dwelling-house with its yard, garden and outhouses. The inclusion in it of the term "appurtenances" makes no material difference to the definition. In the absence of any express declaration of intention to the contrary a conveyance or lease of a house "with the appurtenances" will only pass the house with the yards, curtilage, gardens and orchard, but not land even if it be in the same ownership or occupation as the house, for land cannot be appurtenant to land: *Bettisworth's* case (4); *Smithson* v. *Cage* (5); *Bryan* v. *Wetherhead* (6); Sheppard's Touchstone, 7th ed., pp. 94, 246; and Woodfall's Landlord and Tenant, 23rd ed., p. 174; though such a conveyance may carry an incorporal hereditament: *Lister* v. *Pickford* (7); and *Thomas* v. *Owen.* (8) The Act of 1936 gives the local authority power to make not only demolition orders but also clearance orders involving the removal of buildings.

---

(1) [1900] A. C. 383, 391.
(2) [1906] A. C. 299.
(3) [1917] 2 K. B. 380, 385.
(4) (1590) 2 Co. Rep., 31A, 32A.
(5) (1620) Cro. Jac. 526.
(6) (1625) Cro. Car. 17.
(7) (1865) 34 Beav. 576.
(8) (1887) 20 Q. B. D. 225.

J. Scott Henderson for the owners of the house, respondents. The county court judge was right in quashing the demolition order. For the purposes of the Housing Act, 1936, the word house is not limited to the dwelling-house with its immediate curtilage and garden, but may include other property such as adjoining land owned or occupied along with the dwelling. As to the words in s. 11 of the Act "any house which is "occupied, or is of a type suitable for occupation, by persons "of the working classes," they are not necessarily restricted to premises used for residential purposes. These or similar words occur in other sections of the Act in contexts having no special reference to the use of a house as a dwelling, as, for example, in ss. 4, 6 and 9. The words "suitable for "occupation" were necessary in order to provide for unoccupied premises. The word house, according to the definition in s. 188, sub-s. 1, of the Act, is not limited to a building used as a dwelling place or residence, but is of wider meaning. The term "appurtenances" there included is not used by itself, but is qualified by the expression "belonging thereto "or usually enjoyed therewith" to which some meaning must be given. It is submitted that, in its application to the present case, the word house as there defined would include not only this dwelling-house with its curtilage and garden but also the ten acres of adjoining grass land; and that the learned county court judge correctly took the view that this dwelling-house and the ten acres of land together constituted the house within the meaning of the Act. But for the purposes of the present case it is necessary to consider the further question whether the house is a house suitable for the occupation of persons of the working classes. In considering that question regard should be had not only to the dwelling-house, but to the house in the larger sense in which, it is submitted, the word is used in the Act—namely, as including not only the dwelling-house but also all its surrounding circumstances. The question is in each case one of fact for the local authority or for the county court judge on appeal. In the present case the county court judge rightly came to the conclusion that the house, that is to say the dwelling-house together with the ten acres of pasture land which for years past have been owned and occupied along with it, was not a house of a type suitable for occupation by persons of the working classes, and having come to that conclusion he properly quashed the demolition order. The county court judge was justified in quashing the demolition order on the further ground that this house, being a structure of considerable size and substantially built, ought not to be demolished merely because it has become somewhat dilapidated.

Greer L.J. I will ask my brother, Lord Justice Slesser, to deliver his judgment first, as he was present on the previous occasion.

Slesser L.J. This case raises a question with regard to the definition of " house " in s. 188 of the Housing Act, 1936. That word is there defined as including " any yard, garden, "outhouses, and appurtenances belonging thereto or usually "enjoyed therewith."

The matter came before the learned county court judge on an appeal from a demolition order made by the local authority, and the ground on which the appeal was founded was that the house, together with the ten acres of grass land which was at all material times occupied with it and let with it, was not a house suitable for occupation by persons of the working classes within the meaning of the Housing Acts. It was not certain, at the first hearing, upon what principle the learned county court judge came to the conclusion that this order ought not to have been made. The case was therefore remitted to him for a further statement as to the reasons for his judgment. We have now before us that statement, in which he says that the premises in question are a small dwelling-house, that appurtenant to the house and at all material times occupied therewith are ten acres of grass land, cow-stalls, capable of accommodating ten or a dozen cows, and other farm buildings, that all these premises have for years past been let together, and that it was contended on behalf of the owners that the house was not of a type suitable for occupation by persons of the working classes within the meaning of the Act of 1936, s. 11. Then he says this, that he understood the contention of the local authority to be " that the house was ' of a type suitable ' "for occupation by such persons; and that in deciding "whether that was so or not I ought to have regard only to "the size of the house itself. That argument," he continues, "seemed to me to be inconsistent with the definition of "' house ' in section 188 of the Act," and finally he says, "I took the view that no persons of the working classes, as "so described, would either take this house and its appurtenances on an annual tenancy or be accepted as tenant "by the owner." As he had already said that appurtenant to the house are ten acres of grass land and cow-stalls capable of accommodating ten or a dozen cows, it must be taken that he has arrived at his conclusion upon the basis that the " house " within the meaning of the Act may properly be taken to include the ten acres of grass land, the cow-stalls and the like.

The question for the decision of this Court is whether, in coming to that conclusion, the learned judge was correct in law. In my opinion, he was wrong in law in coming to any such conclusion. In the definition to which I have referred certain specific matters are mentioned, that is to say, any yard, garden and outhouses, and then follows the word " appurtenances." That word has had applied to it, through a long series of cases mostly dealing with the meaning of the word in demises, a certain limited meaning, and it is now beyond question that, broadly speaking, nothing will pass, under a demise, by the word " appurtenances " which would not equally pass under a conveyance of the principal subject-matter without the addition of that word, that is to say, as pointed out in the early case of *Bryan* v. *Wetherhead* (1) that the word " appurtenances " will pass with the house, the orchard, yard, curtilage and gardens, but not the land. That

(1) Cro. Car. 17.

C. A.
1938

Trim
v.
Sturminster
R. D. C.

Slesser L.J.

view, as far as I understand the authorities, has never been departed from, except that in certain cases it has been held that the word "appurtenances" may also be competent to pass incorporeal hereditaments. Certainly no case has been cited to us in which the word "appurtenance" has ever been extended to include land, as meaning a corporeal hereditament, which does not fall within the curtilage of the yard of the house itself, that is, not within the parcel of the demise of the house.

In those circumstances, there being no reason to construe the word "appurtenances" in this case otherwise than in its ordinary meaning, the learned county court judge was wrong in holding that the word "appurtenances" included the ten acres.

How much of the adjacent land ought to be included in the word "appurtenances," depends on the facts of the particular case. As I have said, the word may include orchards, yard, curtilage and gardens. The question is one for the learned judge to decide, but in doing so he must confine his consideration only to so much of the land as, on the face of it, would be considerably less than the whole of the ten acres.

It is also for the judge, upon a proper consideration of the subject-matter as thus indicated, to determine whether that subject-matter is or is not suitable for occupation by persons of the working classes. That is a question which, so far, has not been determined upon a proper basis in this case.

It will then be for the judge upon those facts to come to a conclusion as to whether or not a demolition order can properly be made by the local authority in this case.

We are therefore of opinion that this case should go back to the learned county court judge with a direction to consider the questions which I have mentioned; to have regard to the authorities which explain what is the extent to which the word appurtenances may be used; to limit his consideration of the amount of the land which may be included in the "house" to the matters I have indicated; and finally to decide whether or not a demolition order should be made.

C. A.
1938

TRIM
v.
STURMINSTER
R. D. C.

GREER L.J. I agree that the case should be remitted to the learned county court judge for trial. Upon the evidence before him he may have to decide whether or not the curtilage, with the sheds and other buildings upon it, may be a part of the "house." If he decides that they are, then he must take these appurtenances into consideration in deciding whether or not the house is a house which is suitable for occupation by persons of the working classes. We do not exclude from the consideration of the judge the question whether at any rate some portion of the adjoining land may be regarded as an appurtenance within the definition contained in s. 188 of the Statute.

MACKINNON L.J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellants: *Lovell, Son & Pitfield, for W. H. Creech, Sturminster-Newton.*

Solicitors for respondents: *Rutter & Rutter, Shaftesbury.*

J. R.

C. A.
1938
May 18.

LEVER BROTHERS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Conveyance or Transfer on Sale—Scheme for Amalgamation of Companies—Forty-two per cent. of capital in existing company previously acquired for cash—Issue of unissued capital by transferee company to acquire further 55 *per cent. of capital of existing company—Increase of capital "with a view to "the acquisition of not less than* 90 *per cent. of the issued share "capital of any particular existing company"—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 55—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-ss.* 1 (*b*), (*c*), (*ii.*), (*B*), 2.

In 1919 the appellant company acquired for cash nearly 42 per cent. of the issued share capital of the C. company. In 1936, in connection with a scheme for the amalgamation of the two companies, the appellant company acquired a further 55 per cent. of the issued share capital of the C. company in exchange for the allotment to the shareholders of the C. company of unissued share capital of the appellant company :—

Held, that the transfers of shares which were executed to carry out the latter transaction were not exempt from stamp duty under s. 55, sub-s. 1 (B), of the Finance Act, 1927, since that sub-section contemplated the acquisition under a scheme of amalgamation by an issue of unissued capital of not less than 90 per cent. of the share capital of an existing company. The acquisition in this manner of the balance required over and above shares previously acquired for cash to make up not less than 90 per cent. of the share capital of an existing company did not fall within the sub-section.

Decision of Lawrence J. [1938] 1 K. B. 314 affirmed.

APPEAL from the decision of Lawrence J. (1) on a Case stated by Commissioners of Inland Revenue.

On August 24, 1936, two instruments were presented on behalf of the appellant company, Lever Brothers, Ld., to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instruments were chargeable.

The instruments were transfers of shares. The first was a transfer under seal dated August 17, 1936, and made between London and New York Investment Corporation, Ld., as transferors, and the appellant company as transferees, whereby 1000 6 per cent. first preference shares of 1*l.* each, fully paid, in the New Transvaal Chemical Company, Ld. (hereinafter called the "Chemical company"), were transferred to the appellant company in consideration of the allotment by the appellant company to the London and New York Investment Corporation, Ld., of 857 7 per cent. cumulative preference shares of 1*l.* each in the appellant company, credited as fully paid as on July 1, 1936. The second was a transfer under seal, also dated August 17, 1936, and made between the Sterling Trust, Ld., as transferors, and the appellant company, as transferees, whereby 10,000 8 per cent. "A" preference shares of 1*l.* each, fully paid, in the Chemical company were transferred to the appellant company in consideration of the allotment by the appellant company to the Sterling Trust, Ld., of 10,000 8 per cent. cumulative preference shares of 1*l.* each in the appellant company credited as fully paid as on July 1, 1936.

---

(1) [1938] 1 K. B. 314.

On April 23, 1936, the Chemical company had an authorized capital of 650,000*l.* (divided into 200,000 6 per cent. first preference shares of 1*l.* each, 150,000 8 per cent. "A" preference shares of 1*l.* each, and 300,000 ordinary shares of 1*l.* each), all of which had been issued and were fully paid except 50,000*l.* consisting of 50,000 ordinary shares.

Since August, 1919, the appellant company had been the beneficial owner of all the issued ordinary shares in the capital of the Chemical company. All those shares were acquired by the appellant company by allotment from the Chemical company for cash.

On April 23, 1936, offers were made by the appellant company to the holders of the 6 per cent. first preference shares and the 8 per cent. "A" preference shares in the Chemical company to acquire their shares in consideration of the allotment to them of cumulative preference shares in the appellant company. These offers were accepted by the holders of 196,107 6 per cent. first preference shares, 140,705 registered 8 per cent. "A" preference shares, and share warrants in respect of 5091 8 per cent. "A" preference shares in the Chemical company. Transfers to the appellant company of the preference shares in the Chemical company were prepared and executed, two of the transfers being the subject of the present case.

On April 23, 1936, the amount of the nominal capital of the appellant company was 130,000,000*l.*, of which 61,369,584*l.* had been issued. Unissued share capital of the appellant company was allotted to the transferors of shares in the Chemical company in accordance with the terms of the offers of April 23, 1936, to the amount of 168,091 7 per cent. and 145,796 8 per cent. cumulative preference shares of 1*l.* each.

The Commissioners assessed the transfers with ad valorem duty under the head of charge " Conveyance or Transfer on "Sale " in the Stamp Act, 1891, by reference to ss. 1 and 55 of that Act and other relevant statutory enactments, at the rate of 10*s.* per 50*l.* and every fractional part of 50*l.* of the value at the date of the transfer of the cumulative preference shares of the appellant company then transferred.

Lawrence J. said that the question was whether the transfers were exempt from stamp duty by virtue of s. 55 of the Finance Act, 1927. (1) The Commissioners had held that the

(1) The Finance Act, 1927, s. 55, sub-s. 1, provides : " If in con- "nection with a scheme for the ". . . . . amalgamation of any "companies it is shown to the "satisfaction of the Commissioners "of Inland Revenue that there "exist the following conditions, "that is to say—(*a*) that . . . . "the nominal share capital of a "company has been increased ; "(*b*) that the [transferee] company ". . . . has increased its capital "with a view to the acquisition ". . . . of not less than ninety "per cent. of the issued share "capital of any particular existing "company ; (*c*) that the con- "sideration for the acquisition ". . . . consists as to not less "than ninety per cent. thereof— ". . . . (ii.) where shares are to be "acquired, in the issue of shares "in the transferee company to the "holders of shares in the existing "company in exchange for the "shares held by them in the "existing company ; then . . . . "(B) Stamp duty under the "heading ' Conveyance or Transfer "' on Sale ' in the First Schedule "to the Stamp Act, 1891, shall not "be charged on any instrument "made for the purposes of or in "connection with the transfer of "the . . . . shares. . . . . "

Sub-s. 2 : " For the purposes "of a claim for exemption under "paragraph (B) of subsection (1.) "of this section, a company which "has, in connection with a scheme "of . . . . amalgamation, issued "any unissued share capital shall "be treated as if it had increased "its nominal share capital."

appellant company had not increased its capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the Chemical company. He thought their decision was correct. It was no doubt true in one sense that the increase of capital was made with a view to the acquisition of not less than 90 per cent. of the share capital; but the more natural sense of the words of the section was that the increase of capital must be made in the sense that not less than 90 per cent. must be acquired thereby. This construction was supported by para. (*c*). The acquisition therefore must be the acquisition referred to in para. (*b*), and the acquisition referred to in para. (*b*) was the acquisition of not less than 90 per cent.

The appellant company appealed.

Sir William Jowitt K.C. and *James Wylie* for the appellant company. The relief claimed is under para. (B) of s. 55, sub-s. 1, of the Finance Act, 1927. A man knowing the provisions of s. 155 of the Companies Act, 1929, that enables the holder of 90 per cent. of the share capital of a company to obtain the whole and already holding 40 per cent. of the share capital, would set himself to acquire the balance with a view to the acquisition of at least 90 per cent. When this is done with a view to the amalgamation of companies and unissued share capital is issued in respect of the additional shares acquired, all the conditions of s. 55, sub-s. 1, of the Act of 1927 are satisfied. There must of course be a scheme of amalgamation.

[CLAUSON L.J. It would seem that acquired must mean in sub-s. 7 obtained by virtue of the scheme, and if so, it must bear the same meaning in sub-s. 1 (*b*).]

There need not be an acquisition of 90 per cent. of the share capital under the scheme; thus if the company desiring to effect the amalgamation already possessed 80 per cent. of the shares and entered into the scheme to obtain the necessary balance, that would suffice. The word "acquire" need not bear the same meaning in sub-s. 7, which relates to obtaining repayment, as in sub-s. 1, which relates to obtaining exemption.

[Sir Wilfrid Greene M.R. referred to sub-s. 6.]

The owner of 51 per cent. of the capital of a company who seeks to acquire the remaining 49 per cent., may fairly be said to be acting with a view to the acquisition of the whole 100 per cent. The whole question lies within a very narrow compass, and, it is contended that the appellant company have brought themselves within the section on its true construction.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the respondents. The argument for the appellant company involves the suggestion that the acquisition of ten bicycles by a man who already possessed ninety bicycles amounts to the acquisition of 100 bicycles. The natural meaning of the words "with a view to the acquisition . . . . of not less than ninety "per cent. of the issued share capital" is that acquisition is effected as a single act, and they do not cover a piecemeal acquisition. Further, a scheme of amalgamation of companies implies that the companies are more or less independent before the scheme operates to bring them together, and the section is directed to a case where the whole, or substantially the whole, amalgamation is being effected under the scheme. That is the effect of sub-s. 1, para. (*a*), and reading it with para. (*b*) the intention must be to acquire 90 per cent. of the share capital. That view receives support from para. (*c*), which provides that whether the undertaking or shares are to be acquired the consideration must be shares and not cash. Then only is exemption from stamp duty granted. The appellants contend that 89 per cent. of the share capital might previously have been acquired for cash. That is contrary to sub-s. 1 (*c*) of the section. The words of sub-s. 7 will not bear the construction contended for by the appellants. It clearly contemplates the intention to acquire 90 per cent. of the share capital pursuant to a scheme of amalgamation; but when the whole 90 per cent. is not acquired at once so that relief from stamp duty on transfer cannot be claimed, it allows six months within which, if the total shares acquired are brought up to 90 per cent., the stamp duty paid can be reclaimed. Sub-s. 6 assists the construction for which the

Crown are contending. One of the particular facts of this case is that 42 per cent. of the share capital of the Chemical company were acquired for cash. This places the appellants in a dilemma. Whatever "acquisition" means in sub-s. 1 (*c*) it must also mean in sub-s. 1 (*b*), and sub-s. 1 (*c*) says that the consideration for the "acquisition" must where shares are acquired consist as to not less than 90 per cent. thereof "in the issue of shares in the transferee company." Therefore whether it was necessary in this case for the whole 90 per cent. of the shares of the Chemical company to be acquired at one time, it is clear that the section cannot apply, because 42 per cent. of the shares were acquired for cash.

Sir William Jowitt K.C. replied.

SIR WILFRID GREENE M.R. The appellants, Lever Brothers, Ld., acquired in the year 1919 the whole of the issued ordinary share capital of a company called the New Transvaal Chemical Company, Ld. That company had issued a number of preference shares, falling into two classes, and at the date which is relevant for the purposes of this appeal—namely, April 23, 1936—the Chemical company's issued share capital consisted of 250,000 ordinary shares of 1*l.* each, the whole of which belonged to the appellants, 200,000 6 per cent. first preference shares of 1*l.* each, fully paid, and 150,000 8 per cent. "A" preference shares of 1*l.* each, fully paid. The appellants were minded to acquire the preference capital of the Chemical company, and accordingly on April 23, 1936, they issued a circular, in a form which is familiar, to the holders of preference shares in the Chemical company, inviting them to exchange their shares, on a basis there laid down, for shares in the appellant company, which would be issued in exchange. The result of that offer was that a very large percentage of the preference shareholders agreed, and a very large percentage of the shares fell to be acquired by the appellants. By their holding of the ordinary shares which they had already and the preference shares which they were thus acquiring they would hold more than 90 per cent. of the issued share capital of the Chemical company. I think

C. A.
1938

LEVER BROS., LD. v. INLAND REVENUE COMMISSIONERS.

Sir Wilfrid Greene M.R.

that the ordinary share capital which they already held represented approximately 42 per cent. of the issued share capital of the Chemical company.

In those circumstances the appellants claimed to be entitled to the exemption which is granted by s. 55 of the Finance Act, 1927, in respect of the stamp duty payable on the transfer to them of the preference shares in the Chemical company which they had so acquired. The Commissioners of Inland Revenue refused to admit that claim, and on a case stated by them Lawrence J. upheld their decision and this appeal results.

Sect. 55 of the Finance Act, 1927, provides relief in the case of reconstructions or amalgamations against two classes of duty—namely, capital duty and transfer duty. It contemplates two common methods of amalgamation, or what is commonly called amalgamation: one, the method where one company acquire the undertaking or part of the undertaking of another company, and the other, where a company acquire the shares of another company without acquiring their assets. The section in the latter class of case requires that the acquisition shall be an acquisition of not less than 90 per cent. of the issued share capital of the company which it is desired to take over. The object of fixing a limit like that is obvious. First of all, if the limit had been fixed at 100 per cent., the exemption granted by the section would probably have been effective in very few cases, because in amalgamations of that kind, in practice, it has always proved impossible to get the full 100 per cent. of the shares. On the other hand, the Legislature desired to keep this relief limited to the case where there was, in every business sense, a real amalgamation, and, therefore, it fixed 90 per cent., which, for all practical purposes, is a total acquisition. It did not allow the exemption in cases where less than 90 per cent. of the shares were being acquired. There is another condition in the section—namely, that, where the amalgamation takes place by the issue of shares to the existing holders of shares in the existing company in exchange for their shares, 90 per cent. of the consideration shall be issued to those holders. The object of that is to confine the relief to cases where the shareholders are remaining substantially the same.

The question which arises in the present case is this. The appellants did not, by virtue of a scheme, acquire 90 per cent. or more of the share capital of the Chemical company. They had already acquired approximately 42 per cent. by a cash purchase years ago, and the present scheme, therefore, was a scheme for the acquisition of the remaining 58 per cent., or at least not less than 48 per cent. They say that in acquiring at least a further 48 per cent. they are making up their present holding to the 90 per cent. to which the section refers, and that that is sufficient to bring their acquisition of nearly 58 per cent. within the benefit of the section.

The section starts off with the fundamental and basic condition on which its provisions are to operate. I do not propose to read it at length. It is a long section, but it begins by requiring that certain conditions shall exist in connection with a scheme for the reconstruction of any company or companies, or the amalgamation of any companies. There must, therefore, be a scheme for the amalgamation of companies, and it is in connection with such a scheme that the conditions stated are to exist. When it is shown that those conditions exist in connection with such a scheme the relief is to follow. The provisions relevant to the present case are that the acquiring company (which in the section are called the transferee company and which in the present case are the appellant company) must have issued unissued capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of, in the present case, the Chemical company.

The point arises on that phrase, and the contending arguments are in substance these. The Crown says that that particular condition relates to the case where, under an amalgamation scheme, there is an intention to acquire under that scheme and not by any other method not less than 90 per cent. of the issued share capital. The appellants, on the other hand, say that the words are satisfied in a case where the acquiring company, already holding a certain percentage,

C. A.
1938

LEVER BROS., LD. *v.* INLAND REVENUE COMMISSIONERS.

Sir Wilfrid Greene M.R.

form a scheme with a view to the acquisition of so many additional shares as together with their existing holding will bring their holding up to at least 90 per cent.

In my opinion, the Crown's contention is correct. First of all, it is in accordance with the literal meaning of the words. There must (with regard to the facts of this case) be an amalgamation scheme in connection with which there is an issue of unissued capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the Chemical company. It seems to me that, on the literal meaning of the phrase, that condition has not been fulfilled in the present case. The issue of unissued share capital which has taken place was made with a view to the acquisition of, at the most, 58 per cent. of the issued share capital. It was not made with a view to the acquisition of 90 per cent. So on the mere verbal, literal, meaning of the words, the Crown's contention accords with the language used.

On the other hand, the contention of the appellants involves writing into this language qualifying words and extending the phrase which has been used to cover the case not merely of an acquisition of at least 90 per cent., but the acquisition of a balance necessary to make, with an existing holding, 90 per cent. That is not what the language means. I will not say that the language would not be susceptible of such a meaning were the whole context of the section such as to compel the mind to attribute that meaning to it. I am merely taking the language and saying that the language, by itself, without a context, does not appear to me to be susceptible of the meaning which the appellants attach to it.

The next consideration which appears to me strongly to support the Crown's view is this. It is provided in sub-s. 1 (*c*) that one of the conditions is to be that the consideration for the acquisition of the shares in the Chemical company is to consist, as to not less than 90 per cent., of the issue of shares. In other words, the only type of transaction which the section is assisting is a transaction on a share basis. It affords no assistance in the case where the acquiring company acquires shares for cash. The words " the acquisition " appear in both

LEVER BROS., LD. v. INLAND REVENUE COMMISSIONERS.

Sir Wilfrid Greene M.R.

the conditions, both the one with which I dealt a moment ago, which uses the phrase "with a view to the acquisition "of not less than 90 per cent.," and the condition which provides that the consideration is to be a share consideration. The result of that appears to me to be that if, in the former of those two conditions, the word "acquisition" means "acquisition of 90 per cent.," the whole thing hangs together; but if it means acquisition in the sense of bringing the existing holding up to 90 per cent., it would be impossible to say of the appellants, in the present case, that they had acquired their 90 per cent. for a share consideration, because on the facts of this case 42 per cent. was acquired for cash.

There is one other provision in the section which appears to me to point strongly in the same direction. By sub-s. 6 of the section provisions are put in for what I may, for the sake of brevity, call ensuring some degree of permanence in the amalgamation which is to be carried through. Obviously, the Legislature would not be willing to grant exemption from stamp duties unless it were in connection with something which was not merely in form an amalgamation, but an amalgamation which was not going to be put an end to within a few weeks, or something of that kind, by disposing of the shares which had been acquired. It would have been a curious result if the benefit of a provision which was obviously enacted to encourage, or, at any rate, to prevent discouragement of, amalgamation could be obtained without ensuring that there should be an effective amalgamation with, at any rate, some degree of permanence in it. With a view to that, sub-s. 6 provides, among other matters, that where the acquiring company has acquired shares in the other company (if it is that type of amalgamation), then, if the shares are sold, or if any of the shares are sold, or got rid of, within two years, the benefit of the exemption which has been granted shall be taken back, and the duty must be paid.

The result of the argument put forward on behalf of the appellant company would be a curious one. If they had not held the ordinary shares, and had by one scheme set out to acquire 90 per cent.—thus bringing themselves within the section—and had acquired the 90 per cent. in consideration of an issue of their own shares, they would have been bound to hold the shares so acquired for two years, under the penalty of losing the exemption which had already been granted to them. If the appellant company are right here, they could to-morrow change their mind and decide to sell the ordinary shares, because those ordinary shares are not shares acquired under the scheme. The result of that would be that, at any rate, the limited period of permanence for amalgamations on which the section is insisting would not be achieved in a case such as the present. It does seem to me that that provision of sub-s. 6 points very strongly to the view that this section is dealing, and is dealing only, in the matter of amalgamations by the acquisition of shares, with the simple case of an acquisition of 90 per cent. or more. It is not concerning itself with cases to which one can quite well see that different questions of policy might very easily arise, because, if the appellants are right, a company which already hold 80 per cent. of the shares could acquire the remaining 10 per cent., and then say: "This is an amalgamation scheme." Obviously, if it could not be said that such a thing was an amalgamation scheme, it could not fall within the section. But, if the acquisition of an outstanding 10 per cent. is not an amalgamation scheme, why is the acquisition of an outstanding 58 per cent. an amalgamation scheme, and, if it is, where is the line to be drawn between those two extremes? You would, or might, get into all sorts of difficulties about questions of degree. As I read this section, the Legislature has picked out a simple and typical case of frequent occurrence in practice, and has used language appropriate to giving relief in that case, and in no other case. In my judgment it would be contrary to all principles of construction to force the language used so as to bring the present case within it because it has some apparent attractiveness from the point of view of abstract justice in it. This section is not concerned with such matters. It gives a limited kind of relief in limited circumstances, and the taxpayer must bring himself within the language if he is to get that relief. In my judgment the appellant company entirely fail to do so.

I should mention one further argument which was raised on sub-s. 7. It was said that under sub-s. 7, which I need not read, an acquiring company, which had originally set out with a scheme to acquire less than 90 per cent. of the share capital, could get the benefit of the section if they afterwards decided that they would get the remaining amount necessary to bring it up to 90 per cent., and that in that case they would get the benefit of the exemption provisions if they got in the remainder within six months. It is said that it would be a curious result if a company which, so to speak, acquired 90 per cent. in two bites under what really would be two schemes, should get the exemption, whereas a company such as the present should not. That argument, in my judgment, is based on a misconstruction of the section, because the section does not contemplate anything of that sort. The object of the section, I venture to think, is quite clear. It covers the case where there was, to begin with, a scheme (which is referred to as " the scheme ") for the acquisition of 90 per cent. That scheme is one which ultimately must be carried out ; in other words, the 90 per cent. must be acquired under that scheme, but the sub-section is designed to meet the case where the necessary 90 per cent. has not been acquired in time to enable the exemption to be granted. There might be a case where, to begin with, a company got in only 50 per cent. and then, after a good many months, perhaps by persuasion, or something of that kind, they succeeded in getting enough to make it up to the 90 per cent. It must always be one scheme, and in that case, when they came to lodge the first set of transfers to have the stamp duty adjudicated on them they would not be able to point to a scheme that was 90 per cent. effective, and therefore they would not get the advantage of the section. This sub-section provides that in such a case, if they can show that the scheme has been completed within the stated period, they shall get, not merely the exemption for the balance, but repayment of

C. A.
1938

Lever Bros., Ld. v. Inland Revenue Commissioners.

the duty paid on the transfers which had been brought in and stamped in the early days of the history of the scheme.

In my opinion the case is a clear one, and the appeal must be dismissed with costs.

Scott L.J. I agree.

Clauson L.J. I agree.

Appeal dismissed.

Solicitors: *J. M. B. Stubbs*; *Solicitor of Inland Revenue*.

H. C. G.

ATTORNEY-GENERAL *v.* PROSSOR.

C. A.
1938
May 18, 19.

Procedure—Revenue side—Writ of subpœna—Service out of jurisdiction—Leave for service not obtained—Validity of proceedings—Crown Suits, etc., Act, 1865 (28 *&* 29 *Vict. c.* 104), *s.* 37*—Rules of Supreme Court, Order* XI., *rr.* 1, 11 ; *Order* LXVIII., *r.* 3.

The Crown Suits, etc., Act, 1865, s. 37, provides : "In a suit "at law on the revenue side of the Court against a British subject "resident out of the jurisdiction of the Court in any place except "Scotland or Ireland, the informant may sue out against that "person a writ of subpœna bearing an indorsement stating that "the writ is for service out of the jurisdiction . . . . and the "Court or a judge, on being satisfied by affidavit that the writ "was personally served on the defendant, ... may order from "time to time that the informant be at liberty to proceed in the "suit in such manner and subject to such conditions as to the "Court or a judge seem fit . . . .; . . . . it shall be a condition "precedent to the informant's obtaining judgment that he give "proof of the merits of the claim to the satisfaction of the Court "or a judge, or of the officer of the Court to whom the Court "think fit to refer the matter."

Order LXVIII., r. 3, provides : "Order XI. . . . . shall apply, "as far as it is applicable, to proceedings on the Crown side, and "to proceedings on the Revenue side, of the King's Bench "Division . . . ."

Order XI., r. 1 : "Service out of the jurisdiction of a writ "of summons or notice of a writ of summons may be allowed "by the Court or a judge whenever" [then follows a category of cases under sub-heads (*a*) to (*i*)].

Held (affirming Porter J.'s decision), that Order XI. was not a prohibitory order but one extending the jurisdiction of the Court, and therefore that, though made applicable to proceedings on the Revenue side of the King's Bench Division by Order LXVIII., r. 3, it did not abrogate the right conferred by s. 37 of the Act of 1865 to serve a writ of subpœna on a British subject out of the jurisdiction without the leave of the Court.

APPEAL from an order of Porter J.

The defendant Howard Kemp Prossor, who had resided for many years in France, failed to make returns of his wife's income from English investments for purposes of super-tax or sur-tax, over a number of years, and assessments were made on him in default of returns by him. Mr. Prossor ignored them and finally on July 26, 1935, a writ of subpœna for service out of the jurisdiction was sued out against him under

s. 37 of the Crown Suits Act, 1865, and served on him in France. The leave of the Court for service out of the jurisdiction was not obtained, as it was not needed under the section. Mr. Prossor entered no appearance, and the Crown proceeded to obtain judgment against him for 3917*l*. 9*s*. 6*d*. for super-tax or sur-tax for the years ending April 5, 1923, to April 5, 1934.

On September 29, 1937, Mr. Prossor came on a short visit to England and was staying with a relation in the Cotswolds, when on October 2, 1937, two bailiffs came to take him into custody until payment was made of his debt of 3917*l*. 9*s*. 6*d*. to the Crown. The sum was then paid.

In these circumstances Mr. Prossor applied to the Court for an order setting aside the proceedings under the writ of subpœna and directing repayment of the sum of 3917*l*. 9*s*. 6*d*.

This application was dismissed by Master Jelf and, on appeal, by Porter J. Mr. Prossor appealed. The appeal was heard on May 18 and 19, 1938.

The only ground advanced in support of the appeal was that there had been no valid service of the writ of subpœna in France, because no leave for service out of the jurisdiction was obtained pursuant to Order XI. of the Rules of the Supreme Court, which was made applicable to proceedings on the Revenue side by Order LXVIII., r. 3.

Hon. Sir Stafford Cripps K.C. and *P. B. Morle* for the appellant. By Order LXVIII., r. 1, it was provided that the Rules of the Supreme Court were not to apply, save in so far as they were expressly made applicable, to proceedings on the Revenue side of the King's Bench Division. But in April, 1932, a new rule was added, being Order LXVIII., r. 3, which applied Order XI., so far as applicable, to proceedings on the Revenue side. The effect of this was to cause Order XI., r. 1, to apply, and that rule provides that service out of the jurisdiction may be allowed by the Court or a judge in certain cases, to which there must now be added proceedings on the Revenue side. Other rules of Order XI. that would be applicable include r. 2, which applies generally as regards Scotland and Ireland. Rule 2 (*a*) deals with the case of contracting out of the rule and could have no application. That is also so as regards r. 3, which relates to Probate actions. Rule 4 is a general rule as to giving evidence in obtaining leave to serve out of the jurisdiction and that would be applicable. Rule 7 lays down how notice of a writ is to be served. Rules 8 and 9 are necessarily inapplicable, but r. 11 which deals with the service of certain English documents under conventions entered into with certain foreign countries would apply. It is to be observed that Order LXVIII., r. 3, makes the whole of Order XI., so far as applicable, apply, and not only certain rules of the order as in some other cases. It follows that Order XI., r. 1, must apply to proceedings by writ of subpœna under s. 37 of the Crown Suits, etc., Act, 1865, with the result that the power to serve a writ of subpœna out of the jurisdiction without first obtaining the leave of the Court has been abrogated. The Rules of the Supreme Court are made under the Judicature Act, now the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 99 of the Act of 1925 provides that Rules of Court may be made under this Act for the following purposes: ". . . . "(*g*) for repealing any enactments which relate to matters "with respect of which rules are made under this section." Consequently the effect of Order LXVIII., r. 3, applying Order XI. to proceedings on the Revenue side may well be to vary s. 37 of the Act of 1865 by making it necessary to obtain the leave of the Court before service of a writ of subpœna can be made out of the jurisdiction. It is contended therefore that a writ of subpœna was never properly served on the appellant, with the result that the whole proceedings are void and the sum paid to satisfy the judgment so obtained must be refunded.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. Sect. 37 of the Crown Suits Act is a complete code in regard to the procedure with which it deals of proceedings by writ of subpœna against a British subject out of the jurisdiction of the Court. It is not as if full protection were not afforded to the British subject, for though it permits service of a writ of subpœna out of the jurisdiction without the leave of the Court, the proceedings cannot continue till the Court is satisfied that service has been properly effected, and even in an undefended case the Court has to be satisfied as to the merits of the case before judgment can be obtained. The section is then inapt to have imported into it a provision belonging to quite a different code, as Order XI. does. The wording of Order LXVIII., r. 3, makes it clear that Order XI. is not to apply in its entirety, and indeed that has been admitted, and the question that arises is what is meant by the words "as far as applicable" in Order LXVIII., r. 3. The appellant relies on s. 99 (8.) as giving the Rule Committee power to overrule the provisions of an Act of Parliament, but no rule must be given that meaning unless it is so provided in express terms. The meaning of the words "as far as applicable" was considered in *Inland Revenue Commissioners* v. *Countess of Longford* (1) and it is expressly stated that it has not the meaning of mutatis mutandis. That is exactly the effect sought to be given to it by the argument for the appellant, for the suggestion is to make applicable to the provision under s. 37 something which as it stands does not apply. Nor does this argument deprive Order LXVIII., r. 3, of all effect, for Order XI., r. 11, has direct application and provides against the difficulty of service of documents abroad. That is exactly the sort of provision that the Rule Committee might have been expected to apply to proceedings on the Revenue side.

[CLAUSON L.J. It is to be noted that when the Rule Committee inserted r. 3 of Order LXVIII., an amendment was also made to Order XI., r. 11, making it applicable to cases when leave to serve a writ out of the jurisdiction was not required.]

That greatly assists the Crown's argument and it is difficult to see what procedure other than that under s. 37 could have been in the mind of the Rule Committee in inserting in Order XI., r. 11 (2), the words "or when such leave is not "required."

(1) [1928] A. C. 252.

(2) Order XI., r. 11, provides: "When leave is given in a civil or "criminal cause or matter, or "when such leave is not required, "and it is desired to serve any "writ of summons, originating "summons, notice or other docu-"ment in France or in any other "foreign country with which a

C. A.
1938

ATTORNEY-GENERAL
v.
PROSSOR.

[*Sir Stafford Cripps K.C.* The words make r. 11 apply to r. 2A.] It is to be observed however that r. 2A was added to Order XI. in 1920 and the amendment in r. 11 only made in 1932. The fair inference is that the Rule Committee considered together Order XI., r. 11, and Order LXVIII., r. 3, and it is impossible to say that the Rule Committee were impliedly repealing the section of a statute dealing with a special procedure under which leave to serve out of the jurisdiction was not required. Sect. 37 of the Crown Suits Act, and s. 38 which applies to service on a foreigner out of the jurisdiction, were provisions extending the jurisdiction of the Court in regard to Crown cases, just as the Common Law Procedure Act, 1852, had done in other cases, and Order XI. took the place of the Act of 1852 so far as regards the extended jurisdiction conferred by it. It is difficult to see how Order XI., even when read with Order LXVIII., r. 3, could cut down the jurisdiction conferred by s. 37. It is contended therefore that the writ of subpœna was properly served and it is not suggested that there was any failure to comply with the other provisions of s. 37 in obtaining judgment against the appellant.

Sir Stafford Cripps K.C. replied.

SIR WILFRID GREENE M.R. This appeal raises a point of procedure which is of some importance, and is not without difficulty. The appellant was served with certain assessments to super-tax and sur-tax, he at the time living abroad. To those assessments he did not pay any attention, and finally a writ of subpœna was issued on July 26, 1935, against the appellant for service out of the jurisdiction. That writ was issued under s. 37 of the Crown Suits Act, 1865. It appears that after the issue of that writ the procedure laid down by that section was followed by the Crown. The appellant did

"convention in that behalf has "been or shall be made, the following procedure . . . . shall "be adopted . . . . (3) an official "certificate transmitted through "the diplomatic channel by the "foreign judicial authority, or by "a British Consular authority, to "the English Court establishing "the fact and the date of service "of the document, shall be deemed "to be sufficient proof of such "service. . . . ."

C. A.
1938

ATTORNEY-GENERAL
v.
PROSSOR.

Sir Wilfrid Greene M.R.

not appear in those proceedings, and eventually the Crown obtained judgment against him. There is no suggestion that the procedure laid down by the section, under which the Court has to be satisfied with regard to certain matters, was not complied with. Armed with that judgment, the Crown proceeded to enforce it against the present appellant on an occasion when he was visiting this country, and under process of execution he was compelled to pay the amount claimed. He now, in these proceedings, seeks to have the judgment and the service of the writ set aside. He originally did so on several grounds, but the only ground which has been relied on before us is that the service of the writ of subpœna out of the jurisdiction was not an effective service, with the result that the Court had no jurisdiction to entertain the proceedings. Porter J. as he then was, rejected that argument, and dismissed the application, and the present appeal results from his decision.

The substantial question involved may be shortly stated. It is this: Did a certain amendment introduced into Order LXVIII. in the year 1932, and now appearing as r. 3 of that Order, have the effect of substituting the provisions of Order XI. in regard to service out of the jurisdiction for the provisions of s. 37 of the Crown Suits Act, so far as they relate to service? The main point, of course, is that under s. 37 of the Crown Suits Act a writ of subpœna may be sued out, and served, without any previous application to the Court. Under Order XI. the service of a writ for service out of the jurisdiction cannot be effected without the previous leave of the Court. Sect. 37 provides, as I have said, that the informant may sue out against a British subject resident out of the jurisdiction a writ of subpœna bearing an endorsement stating that the writ is for service out of the jurisdiction of the Court. Then the Court, when satisfied by affidavit, of certain matters, such as the service, or reasonable efforts to effect service, wilful neglect to appear, or that the respondent is living out of the jurisdiction of the Court in order to defeat the claim, may make orders giving liberty to proceed. That, as I have said, was done in this case. The section also provides that before obtaining judgment the informant must give proof of the merits of the claim to the satisfaction of the Court, or a judge, or an officer of the Court to whom the Court thinks fit to refer the matter.

That section is a section which extended the jurisdiction of the Court of Exchequer because, of course, in those days it was the Court of Exchequer which was concerned with such matters on its Revenue side. It extended the jurisdiction of the Court of Exchequer enabling it to entertain proceedings against British subjects, provided that they were brought before the Court in the manner there indicated. Every provision for service out of the jurisdiction is, of course, a provision which extends the Common law jurisdiction of the King's Courts. The original extension took place in the Common Law Procedure Act of 1852, and for the purposes of general litigation that has been superseded by Order XI. of the Rules of the Supreme Court made originally under the Judicature Act of 1873. This s. 37 is, like the Common Law Procedure Act, and like Order XI., a statutory extension of the jurisdiction of the King's Courts. The Rules of the Supreme Court did not apply, and they still do not apply, save in so far as they have been made applicable, to proceedings on the Revenue side of the King's Bench Division. That is provided for in r. 1 of Order LXVIII. That provision has been modified to a certain extent, by amendments introduced from time to time into that Order. Thus r. 2 of the Order made applicable to proceedings on the Revenue side a number of Orders there specified relating to procedural matters. Rule 2A passed in 1906, applied r. 8 of Order II. The particular rule with which we are concerned, namely, r. 3, was introduced in the year 1932, and is in the following terms: "Order XI. "(which relates to service out of the jurisdiction) shall apply, "as far as it is applicable, to proceedings on the Crown side, "and to proceedings on the Revenue side, of the King's Bench "Division."

It is said on behalf of the appellant that the effect of the introduction of that rule is to take away the power which the Court undoubtedly had before of entertaining proceedings

C. A.
1938

ATTORNEY-GENERAL
v.
PROSSOR.

Sir Wilfrid Greene M.R.

where the provisions of s. 37 of the Crown Suits Act had been followed, and to deprive the Court of jurisdiction to entertain proceedings unless leave had previously been given to serve the writ out of the jurisdiction. It is said, in support of that argument, that the rule is general in terms, in the sense that it does not purport to apply merely one rule, or two rules, of Order XI., but it applies Order XI. generally as far as it is applicable, and it is pointed out that that is in contrast to r. 2A, and to r. 4, each of which applies specific rules of other Orders. It is also pointed out that r. 3 is in the same class in that respect as r. 2, which again applies Orders and not merely rules. It is also said that, unless the effect for which the appellant contends is given to r. 3, it will have no effective content. The way in which it is said that that rule will operate on Order XI. is this, that in Order XI., r. 1, reference must be inserted in the opening words to a writ of subpœna, and a further category of cases where service out of the jurisdiction is to be permitted (which would be (*j*)) must be inserted with words to this effect: "where the proceedings "are on the Revenue side of the King's Bench Division." It is said that, if that is done, it has the effect of modifying the provisions of s. 37 of the Crown Suits Act. Sir Stafford Cripps, on behalf of the appellant, did not accept the conclusion which I am about to state: but it appears to me that, if effect is to be given to his argument, you must not merely write those affirmative words into Order XI., but you must also by implication negative and annul the jurisdiction which had previously existed in the Court under s. 37 of the Crown Suits Act. As I have already pointed out, Order XI. is an extension of the jurisdiction of the Court, and so was s. 37. Sect. 37 lays down the conditions in which the Court is to have that extended jurisdiction. Order XI. does the same thing, and merely by inserting a reference to a writ of subpœna in Order XI., you would not, so far as language is concerned, destroy the extended jurisdiction which had already been given by s. 37. Order XI., in other words, is not, on the face of it, a restrictive or prohibitory Order at all. It is one which extends the jurisdiction of the Court.

A further curious result would follow from the argument. Under Order XI. there are certain safeguards in that, before leave can be obtained to serve a writ out of the jurisdiction, the Court must be satisfied with regard to certain matters. Subject to that, and when the Court is satisfied with regard to those matters, the writ, or the notice of the writ, as the case may be, can be served, and the proceedings will continue in the ordinary way, like any other proceedings. But under s. 37, as I have pointed out, there are certain safeguards which must be observed after the writ has been issued, and the Court must be satisfied with regard to a number of matters. The anomalous result, therefore, would follow, that writs of subpœna would be brought under the provisions of Order XI., so far as it requires certain matters to be proved to the satisfaction of the Court before leave is obtained, but would still be left in the position, unlike other proceedings, that the Court would have to be satisfied about the matters mentioned in s. 37 before it could allow the action to proceed.

Of course, if the language of the rule was such as to show a clear intention, not merely to take away an existing jurisdiction of the Court, but to leave these matters on the Revenue side in the curious position which I have just indicated, if the language was sufficiently clear to produce that result, it must of course be followed; but the language which is relied upon appears to me, if I may say so, about as unsuitable to produce such a result as any language could be. This is a case where there was, on the statute book, a statute dealing with an important matter of jurisdiction. The Rule Committee no doubt has power to deal with existing statutes so far as they relate to matters of procedure; but that the Rule Committee, by the language of r. 3 of Order LXVIII., should have affected in such a remarkable and striking manner an existing statutory provision, such as s. 37 of the Crown Suits Act, by the language which it has used, I find impossible to believe. It seems to me that the language, on the face of it, is not the language that one would expect to find used in order to produce such an important and radical result. I quite agree that, if there was no content for the language used, unless effect were given to

C. A.
1938

ATTORNEY-GENERAL v. PROSSOR.

Sir Wilfrid Greene M.R.

this argument, we should find ourselves constrained to accept it, but the Attorney-General has satisfied me that there is a content quite intelligible.

At the same time as r. 3 was introduced into Order LXVIII. an amendment was made to r. 11 of Order XI. itself. That rule provides for the adoption of certain machinery for service in cases where Conventions have been made with a foreign country in that behalf.

The original Convention was, I think, made with France and there are one or two others made since. That rule of Order XI., previously to the alteration to which I have referred, which was made in 1932, provided only for cases where leave had been given to serve out of the jurisdiction, that is to say, in cases of service out of the jurisdiction where no leave was required the provisions of that rule did not apply. Contemporaneously with the introduction of r. 3 of Order LXVIII., r. 11 of Order XI. was made applicable to cases where such leave is not required. One case where leave was not required before 1932 was a case where the writ of subpœna was served under s. 37 of the Crown Suits Act. It is perfectly true that the introduction of those words "where such leave is not "required" would not by itself have brought the writ of subpœna into the picture, because the rule then would only have applied to writs of summons or other ordinary procedure in the Courts. But it was the new r. 3 of Order LXVIII. which applied Order XI. so far as applicable to proceedings on the Revenue side, and this had the effect by combination with the words "where such leave is not required" of making the procedure laid down in r. 11 applicable to proceedings on the Revenue side. It is said that those words "where such leave "is not required" are inserted or would properly have been inserted to deal with a casus omissus—namely, the case mentioned in r. 2A, where the parties have made agreements with regard to jurisdiction. It is perfectly true that, without those words, cases falling under r. 2A would not fall under r. 11; but that does not appear to me to be any ground for saying that the only object of the alteration in r. 11 was to make it applicable to cases falling under r. 2A. The argument that there is no content for r. 3 of Order LXVIII. is one which, in my opinion, fails. I quite appreciate the force of the argument, based on what is undoubtedly the fact, that r. 3 in terms purports to apply the whole Order and not merely individual rules of it, but I find myself unable to give to the language used the effect of taking away the statutory jurisdiction conferred by s. 37, and that in short is the substantial ground of my judgment, that I cannot construe the words as having that effect. The result is that the appeal must be dismissed with costs.

SCOTT L.J. After the argument that we have heard it is impossible not to feel doubt as to what the intention of the Rule Committee was in 1932 when they passed the new rule (Order LXVIII., r. 3) in the general terms that they did, and at the same time passed the new r. 4 in the limited terms that they did, but I agree with the conclusion at which the Master of the Rolls has arrived. There is no doubt that under s. 37 of the Crown Suits Act, 1865, the Court was given a jurisdiction which, either then or pursuant to the provisions of the Common Law Procedure Act of 1852, was an entirely new jurisdiction unknown theretofore to the English common law, and consequently the rule in question here, r. 1 of Order XI., is a rule which, if applied to that section, would cut down the jurisdiction of the Court conferred by it. Under the Judicature Act of 1925, s. 99: " Rules of Court may be made under this "Act for the following purposes:—(*a*) For regulating and "prescribing the procedure," etc., and also under (*g*) " For "repealing any enactments which relate to matters with "respect to which rules are made under this section." There is, therefore, no doubt whatever that the Rule Committee could, had it chosen, have passed a rule in 1932 applying what I will compendiously call the " leave " procedure of Order XI. to the proceedings on the Revenue side, saying in terms that to that extent ss. 37 and 38 of the Act of 1865 should be treated as amended.

The argument of Sir Stafford Cripps is that the rule, as it stands, has that effect. For the reasons given by my Lord, I do not think we are justified in saying that that object has been achieved by the rule.

CLAUSON L.J. Reading Order XI. as it stood immediately before r. 11 of Order XI. was amended on February 19, 1932, I can find nothing which could properly be described as being applicable to a proceeding on the Revenue side of the King's Bench Division. On February 19, 1932, an amendment was made to Order XI., which had the effect of introducing into that Order something which would be applicable to a proceeding on the Revenue side, if it were so applied. A provision was inserted in r. 11 of Order XI. which enabled certain forms of service to be adopted, not only in the cases to which Order XI. applied—that is cases where leave was given by the Court to serve abroad—but also in cases where such leave was not required. Accordingly, if the matter had stood there, the position would have been that there was something in Order XI. as so amended which was capable of being applied to proceedings on the Revenue side, but which did not apply to proceedings on the Revenue side because under Order LXVIII., r. 1, the Rules of the Supreme Court do not apply, unless expressly provided, to proceedings on the Revenue side. On the same day and by the same Order the Rule Committee proceeded by a new rule, Order LXVIII., r. 3, to apply to proceedings on the Revenue side such parts of Order XI., as I read it, as were applicable to such proceedings. That seems to me to mean that they apply r. 11 of Order XI. (which deals with certain special methods of service), to proceedings on the Revenue side. So read the rule is perfectly intelligible and is not inapt for dealing with the matter in hand. But we are asked by counsel for the appellant to construe Order LXVIII., r. 3, as upsetting the procedure laid down by the Crown Suits Act, making it impossible to get what may be called default proceedings on foot without the previous leave of the Court, a very serious inroad upon the provisions of that section.

I agree that under the Judicature Act the Rule Committee has full power even to repeal, and certainly to affect, procedural statutes, including the Crown Suits Act; but I also agree

C. A.
1938

ATTORNEY-GENERAL
v.
PROSSOR.

Clauson L.J.

that, if that was what the Rule Committee were attempting to do, they chose singularly inapt language for the purpose. As I can find a perfectly reasonable construction of Order LXVIII. r. 3, without imputing to the Rule Committee the intention of affecting the Crown Suits Act in this remarkable way, I see no difficulty in adopting that construction. For these reasons I agree.

Appeal dismissed.
Leave to appeal was given.

Solicitors: *Sutton, Ommanney & Oliver*; *Solicitor of Inland Revenue.*

H. C. G.

1938
May 6.

THE KING *v.* HOWARD AND ANOTHER.

Ex parte DA COSTA.

Bastardy—Affiliation order—Appeal by putative father to quarter sessions —Allowance of appeal on ground of insufficient corroboration of mother's evidence—Decision on merits—Decision of quarter sessions final—No jurisdiction for petty sessions to hear further complaint.

Where on appeal to quarter sessions an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence, the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices.

Reg. v. *Glynne* (1871) L. R. 7 Q. B. 16 approved and followed.

Reg. v. *Harrington* (1864) 9 L. T. (N. S.) 721 also approved, but distinguished on the ground that the proceedings there in question were in petty sessions, where a decision in favour of the putative father on the ground of insufficient corroboration is in the nature of a non-suit and does not bar a subsequent application by the mother.

RULE NISI for prohibition.

This was a rule directed to William Reginald Howard, the stipendiary magistrate for the county borough of East Ham, and to Dorothy Emily Dawson to prohibit them from proceeding with the hearing of a certain summons issued on the complaint of the said Dorothy Emily Dawson, a single woman, that one Harry Da Costa was the father of her bastard child. The ground of the rule was that the stipendiary "had no "jurisdiction to hear or determine the summons by reason "that the complaint the subject-matter of the said summons "had already been heard and determined by the court of "quarter sessions after a hearing upon the merits."

The following statement of the facts is taken from the judgment of Lord Hewart C.J.: On August 7, 1937, Mr. Da Costa was summoned to appear on August 12 to answer a summons alleging that he was the father of the complainant's bastard child. That summons was heard on August 12, and the solicitor for Mr. Da Costa, who is the person supporting this rule, submitted that there was no corroboration of the complainant's evidence as required by the statute—in other words, those of s. 4 of the statute itself, no corroboration "in some "material particular by other evidence to the satisfaction "of the said justices." The meaning of those words has long been determined to be "in some particular tending to implicate "the putative father, making it more probable than not that "he was the father of the child." That submission was overruled, and, no evidence being tendered by the putative father, an order was made adjudging him to be the father.

His appeal to the Essex quarter sessions was heard on September 30. The respondent and her witnesses gave evidence on oath, and, at the close of her case, Mr. Da Costa's counsel submitted that he had no case to answer. Counsel for the respondent replied, and quarter sessions held that there was no case to answer, and quashed the order of August 12. According to Mr. Da Costa the Court was asked by the respondent's counsel to state in its order that the sole ground for allowing the appeal was lack of corroboration, but expressly refused to make that order, and made the usual form of order allowing the appeal. Another affidavit somewhat diminishes the emphasis of that refusal, but it is clear that quarter sessions made only the usual order stating that the appeal was allowed.

On October 13 the putative father was served with a fresh summons to answer a further claim by the mother, and that summons came on for hearing on October 26. A submission was made by the putative father that the matter had already been determined by quarter sessions, and that the stipendiary had therefore no jurisdiction to reopen it. The magistrate adjourned the matter that it might be finally determined, and delivered a written judgment holding that he had jurisdiction to hear it. The applicant then obtained this rule.

George Pollock showing cause. It was argued before the magistrate that the appeal necessarily acts as a bar to further proceedings, but it is submitted that that is so only if the

1938

REX
v.
HOWARD.
DA COSTA,
Ex parte.

decision of quarter sessions was a decision on the merits. The true position is that where there has been a decision on the merits, the matter is finally concluded; but where there has been no decision on the merits, it is not finally concluded. What amounts to a hearing on the merits is nowhere defined and depends on the facts in each case.

[LORD HEWART C.J. Is it your contention that it is not a hearing on the merits if the matter is decided on the mere question of want of corroboration ?]

It seems that that must be so, because the mother can undoubtedly go back to the justices in some circumstances.

[HUMPHREYS J. Is it still not a hearing on the merits even though they have heard all the evidence that either side desires to adduce ?]

[LORD HEWART C.J. And is there not a second stage ? How if there is an appeal and a decision which quarter sessions says is not based wholly on lack of corroboration ?]

A decision based on lack of corroboration is the equivalent of a non-suit. It is for the magistrate to decide whether the matter has been decided on a non-suit or on the merits. It does not matter in what court the decision was given. Prima facie, no doubt, a hearing is a hearing on the merits, and the magistrate might require the applicant in fresh proceedings to satisfy him that the result of the former proceedings was no more than a non-suit. In the present case he rightly first applied his mind to the question whether there had been a hearing on the merits, because until there has been such a hearing the matter is not concluded. It is a matter of fact for the Court before which the second summons is brought to decide where the line of demarcation lies.

[He referred to *Reg.* v. *Machen.* (1)]

[LORD HEWART C.J. Apparently the decision of that case is that the determination by quarter sessions is final, but the decision of justices out of sessions may be a non-suit.]

In *Reg.* v. *Harrington* (2) it was held that the mother could go with a fresh application before the justices. The function

(1) (1849) 14 Q. B. 74. (2) 9 L. T. (N. S.) 721.

of quarter sessions—or now of the appeal committee—is simply that of justices. It is a rehearing.

[HUMPHREYS J. In *Reg.* v. *Glynne* (1) Lush J. points out that the mother could not then go to quarter sessions, and therefore might go back to the justices with fresh evidence, but that the decision of quarter sessions is always final.]

Reg. v. *Glynne* (1) seems at first sight irreconcilable with *Reg.* v. *Harrington.* (2) It must be limited to decisions on the merits, for, as Blackburn J. says (3): "A non-suit directed "by the House of Lords would not be final." If that dictum is right, and if *Reg.* v. *Machen* (4) is right in saying that a dismissal on the ground of want of corroboration is a non-suit, then *Reg.* v. *Glynne* (1), though it appears to be against me, is not really so. [He also cited *McGregor* v. *Telford.* (5)]

J. C. Llewellyn in support of the rule was not called on.

LORD HEWART C.J. This is a rule nisi for a writ of prohibition to the learned stipendiary magistrate for the county borough of East Ham, and to Dorothy Emily Dawson, to prohibit the magistrate from proceeding to hear a certain summons dated October 9, 1937, whereby Dorothy Emily Dawson, a single woman, was the complainant against Harry Da Costa, alleging him to be the father of a bastard child. The ground of the rule is that the stipendiary "has no juris-"diction to hear or determine the summons by reason that "the complaint the subject-matter of the said summons has "already been heard and determined by the court of quarter "sessions after a hearing upon the merits."

After stating the facts as set out above, his Lordship continued: It is in those circumstances that there has been an application for prohibition. Our attention has been directed to several cases, some very much in point, others less so. One thing has been made abundantly plain: that there has been a development, I will not say in the law, but in the clearness with which the law has been explained.

---

(1) (1871) L. R. 7 Q. B. 16.
(2) 9 L. T. (N. S.) 721.
(3) L. R. 7 Q. B. 18.
(4) 14 Q. B. 74.
(5) [1915] 3 K. B. 237.

If one looks at *Reg.* v. *Harrington* (1) it is said that "a "dismissal upon the ground of there being no sufficient corro-"borative evidence is not a dismissal upon the merits." That case decides that where an application to justices in petty sessions is dismissed, not upon the merits, but merely for want of corroboration, the complainant is not debarred from making a second application. What is there being dealt with is an application to justices in petty sessions. The matter received a different and, indeed, opposite complexion a few years later in *Reg.* v. *Glynne.* (2) In that case it is clearly laid down that "where on appeal to quarter sessions"—quarter sessions being distinguished for this purpose by the whole width of the sky from petty sessions—"an order of affiliation "is quashed on the ground of the insufficiency of the corrobor-"ative evidence, ... the order of quarter sessions is a "decision on the merits, and is final, and fresh proceedings "cannot be taken before justices."

It is to be observed that in that case the judges were Blackburn, Mellor and Lush JJ. Of those three, two (Blackburn and Mellor JJ.) had been members of the Court which heard *Reg.* v. *Harrington* (1), and it appears that "after the respondent and the only two witnesses called by "her counsel had been examined and cross-examined, counsel "for the appellant submitted that there was not sufficient "corroborative evidence as required by the statute. After "having retired for consultation with the other justices, the "chairman said: 'What we have to consider is, whether the "'evidence of the respondent is corroborated with regard to "'the main issue in any material point; a large majority "'of us are of opinion it is not, and therefore we do not "'call upon the appellant to reply. The order is conse-"'quently quashed.'"

A fresh summons was obtained in that case, and the justices in petty sessions refused to hear it. There followed the rule calling upon certain justices of Flintshire to show cause why they should not adjudicate upon that second summons. It was therefore made perfectly clear that the ground upon

(1) 9 L. T. (N. S.) 721.

(2) L. R. 7 Q. B. 16.

which the justices acted was that there was an absence of the corroboration required by the statute, and that was made clear by the voice of the chairman speaking at quarter sessions. In those circumstances the argument and the observations of the Court during the argument are of some importance. For example, Lush J. says (1): "It is immaterial whether "the decision of petty sessions was on the merits or not. A "fresh application might have been made if the previous "dismissal had been on the merits." Again, on the same page, when counsel cited a decision in which it was pointed out that orders in bastardy were always treated as orders, not as convictions, Lush J. interposed: "That was a case "of an order of petty sessions, not of quarter sessions." All the judgments in *Reg.* v. *Glynne* (1) made it clear that there was a fundamental distinction between petty sessions on the one hand and quarter sessions on the other. The judgment of Mellor J. was perfectly unambiguous. He said (2): "It "appears that all the cases upon which Mr. Merewether relied "were cases in which the previous decision was not a decision "of the quarter sessions, but of the petty sessions. I think the "ground of distinction in those cases was rightly taken, and I "think it is perfectly consistent with those cases to hold that "when a hearing of this kind has taken place before a court "of quarter sessions, it is final, and deprives any petty sessions "thereafter of any jurisdiction to rehear."

In like manner, on the same page, Lush J. said (2): "Neither "party is concluded by the decision of the petty sessions. If "they decline to make an order, the woman cannot appeal "to the quarter sessions against their decision"—that, of course, is no longer the case—"and therefore this Court "has held that she is at liberty to apply again to the petty "sessions, and to produce other evidence before them. If, "on the other hand, the justices make an order, the putative "father is, by the express terms of the statute, entitled to appeal "to the quarter sessions; so that the decision of the petty "sessions is not binding upon either party. Then I think both "reason and convenience require us to hold that the decision

(1) L. R. 7 Q. B. 16, 20.

(2) Ibid. 25.

"of the court of quarter sessions is binding and conclusive "upon the parties. The decrees of a court of appeal, from "its very nature and constitution, must be binding upon the "inferior tribunal."

That determination that the decision of quarter sessions is final and binding goes back to 1871, and since that time the only case that can be said to throw any light on the matter is *McGregor* v. *Telford* (1), but that is a purely negative judgment, which leaves *Reg.* v. *Glynne* (2) unimpaired. As long as *Reg.* v. *Glynne* (2) stands, an argument such as that which we have heard to-day is really quite impossible, and in my opinion the rule must be made absolute.

BRANSON J. I agree.

HUMPHREYS J. I agree, and I only desire to add that, in my opinion, the headnote to the report in the Law Reports of *Reg.* v. *Glynne* (2) correctly represents the judgments: "Where on appeal to quarter sessions an order of affiliation is "quashed on the ground of the insufficiency of the corroborative evidence, ... the order of quarter sessions is a "decision on the merits, and is final, and fresh proceedings "cannot be taken before justices." I think that decision is binding on us, and even if it were not, I entirely agree with it. I also think that *Reg.* v. *Harrington* (3) is untouched by *Reg.* v. *Glynne* (2), and also remains good law.

Rule absolute.

Solicitors showing cause: *Duthie, Hart & Duthie.*
Solicitors supporting the rule: *Breeze, Benton & Co.*

(1) [1915] 3 K. B. 237.
(2) L. R. 7 Q. B. 16.
(3) 9 L. T. (N. S.) 721.

J. W. H.

COMMERCIAL UNION ASSURANCE COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1937
Oct. 18, 19.

Revenue—Stamp duty—Policy—Instrument securing payment of sum half-yearly in consideration of payment of lump sum—Annuity—Annuity by way of repayment—Annuity by way of sale—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 60, 87, *sub-s.* 2 ; *Sch. I.*

An instrument was issued by an insurance company to E. P. whereby, the sum of 1000*l.* having been paid by E. P. to the insurance company, there was secured to E. P. the sum of 52*l.* 5*s.* payable half-yearly during a period of eleven years. The sum of the half-yearly payments was calculated to return to E. P. over that period the said 1000*l.* with interest thereon at 2½ per centum per annum, and aggregated 1149*l.* 10*s.* :—

Held, that this was an annuity, as it had reference to a fraction of a year ; but that it was not an annuity by way of sale within s. 60 of the Stamp Act, 1891, but an annuity by way of repayment within s. 87, sub-s. 2, of the Act, and was a "bond, covenant, "or instrument of any kind whatsoever, being the only or "principal or primary security for any annuity (except upon the "original creation thereof by way of sale . . . .)" in Sch. I.

CASE stated by Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

On September 5, 1936, an instrument was presented on behalf of the appellants, the Commercial Union Assurance Company, Ld., to the Commissioners of Inland Revenue, under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners on the amount of stamp duty with which the instrument was chargeable. The instrument was a policy No. 41231 issued by the appellants to one E. P. dated August 28, 1936, whereby, the sum of 1000*l.* having been previously paid by E. P. to the appellants, there was secured to E. P. the payment to him by the appellants of a sum of 52*l.* 5*s.* half-yearly during a term of eleven years, the aggregate of these payments being 1149*l.* 10*s.* The policy was issued in pursuance of a proposal made to the appellants by E. P. dated August 6, 1936, and the amount of the half-yearly payments was calculated so as to return to E. P. over the said eleven years the said 1000*l.* with interest thereon at the rate of 2*l.* 10*s.* per centum per annum.

1937

COMMERCIAL UNION ASSURANCE CO. *v.* INLAND REVENUE COMMISSIONERS.

The proposal was in the following form, omitting immaterial details :—

Total amount to be paid by instalments ...	1149*l.* 10*s.*
Are the instalments to be paid annually, half-yearly, or quarterly ?	Half-yearly.
Date for payment of first instalment ...	Feb. 7, 1937.
Date for payment of last instalment ...	Aug. 7, 1947.
Amount to be paid by person making the proposal	1000*l.*
Signature of proposer	E. P.

It was contended on behalf of the appellants that the said policy was chargeable with ad valorem duty by reference to the head of charge " Bond, Covenant, or Instrument of any "kind whatsoever " in Sch. I. to the Stamp Act, 1891 (1), at the rate of 2*s.* 6*d.* per 100*l.* or fractional part of 100*l.* of the total amount secured, or, in the alternative, that it was chargeable by reference to s. 87, sub-s. 2 (1), of the said Act at the rate of 2*s.* 6*d.* per 100*l.* of the aforesaid 1000*l.* paid by E. P.

---

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 60 : "Where upon "the sale of any annuity or other "right not before in existence "such annuity or other right is "not created by actual grant or "conveyance, but is only secured "by bond, warrant of attorney, "covenant, contract, or otherwise, "the bond or other instrument, or "some one of such instruments, if "there be more than one, is to be "charged with the same duty as "an actual grant or conveyance, "and is for the purposes of this "Act to be deemed an instrument "of conveyance on sale."

Sect. 87, sub-s. 2 : "A security "for the payment of any rent-"charge, annuity, or periodical "payments, by way of repayment, "or in satisfaction or discharge of "any loan, advance, or payment "intended to be so repaid, satis-"fied, or discharged, is to be "charged with the same duty as "a similar security for the pay-"ment of the sum of money so "lent, advanced, or paid."

Sch. I. : "Stamp Duties on "Instruments . . . . Bond, "Covenant, or Instrument of any "kind whatsoever.

"(1.) Being the only or princi-"pal or primary security for "any annuity (except upon the "original creation thereof by "way of sale or security, and "except a superannuation "annuity), or for any sum or "sums of money at stated "periods, not being interest for "any principal sum secured by "a duly stamped instrument, "nor rent reserved by a lease "or tack.

"For a definite and certain "period, so that the total amount "to be ultimately payable can "be ascertained :—The same ad "valorem duty as a bond or cov-"enant for such total amount."

1937

Commercial Union Assurance Co. v. Inland Revenue Commissioners.

The Commissioners were of opinion that the policy was security for an annuity purchased by E. P. for 1000*l.* and was not security for a " sum or sums of money at stated periods " not constituting an annuity. They therefore assessed the duty as on a conveyance on sale under s. 60 of the said Act (1) at the rate of 10*s.* per 50*l.* on 1000*l.*

The company appealed.

Terence N. Donovan for the appellants. This policy is a contract for the repayment of the 1000*l.* with interest, that is for sums of money at stated periods for a definite and certain period within the meaning of " Bond, covenant, or instrument " in Sch. I. to the Stamp Act, 1891, chargeable with a duty of 1*l.* 5*s.* Alternatively it is " a security for the payment of "any . . . . annuity, or periodical payments, by way of "repayment " within the meaning of s. 87, sub-s. 2, of the Stamp Act, 1891 (1), and chargeable with the same duty. It is essential to the case for the Crown to show that this policy was the sale of an annuity within the meaning of s. 60 of the Act. (1) But this is not an annuity, and the word never appears either in the proposal or the policy. An annuity is the purchase of an income, usually involving a change of capital into income : per Mathew L.J. in *Scoble* v. *Secretary of State for India.* (2) The case states that the amount of the half-yearly payments was calculated so as to return to the policy-holder the 1000*l.* with interest thereon at the rate of 2*l.* 10*s.* per centum per annum. Even if it was an annuity it was not upon sale within s. 60 of the Act, but was an "annuity . . . . by way of repayment " within s. 87, sub-s. 2.

There is no decision in point ; but the matter of what constitutes an annuity for income tax purposes was discussed in *Scoble's* case (2) and *Perrin* v. *Dickson.* (3)

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown. The assumption underlying the argument for the appellants is a somewhat artificial one, for it treats the insurance company as borrowers of the 1000*l.*, which they repay over a series of years. The issue is whether this is an annuity or a repayment of capital.

---

(1) See note (1) ante, p. 552.

(2) [1903] 1 K. B. 494, 504 ; affirmed in H. L. [1903] A. C. 299.

(3) [1930] 1 K. B. 107.

It is contended for the Crown that it is the sale of an annuity within the meaning of s. 60 of the Act of 1891 (1) and therefore is an instrument of conveyance on sale chargeable with a duty of 10*l*. Or it is a "sale of any . . . . other right" within the same section. There being different annuities mentioned in the schedule, ss. 60 and 87, sub-s. 2, are explanatory. One can only get at the sections by reference to the schedule. In the present case it cannot be suggested that there was a pre-existing debt repayment of which was secured by this policy. This was a purchase—namely, the getting of something for a consideration, and it can make no difference that the consideration is calculated on interest tables. Here the policy-holder goes to the company and says: "I will give you "1000*l*.; how much will you pay me annually for that?" It is conceded that the transaction in *Scoble* v. *Secretary of State for India* (2) was not a purchase because there there was an antecedent debt. In that case Mathew L.J. said (3): "An "annuity means generally the purchase of an income, and "usually involves a change of capital into income, payable "annually over a number of years." Could any words more aptly describe the present transaction? *Perrin* v. *Dickson* (4) should be considered with reference to its special facts; the only general principle it seems to lay down is that repayment by way of annuity is not an annuity. Here E. P. did not risk his capital at all: see *Perrin* v. *Dickson*, per Rowlatt J. (5) And with regard to the cases cited, there is nothing inconsistent in saying that this is not an annuity for income tax purposes, but is an annuity for stamp duty purposes, because income tax does not tax capital. It is submitted that this is a sale of an annuity within s. 60, and no decision precludes the Court from so holding.

Terence N. Donovan in reply. Nothing was said by the Commissioners about "other right." In *Perrin* v. *Dickson* (5), although the transaction was described in the policy as an annuity, the Court looked into its real nature and held that it was not an annuity. The Crown cannot treat a transaction which has its own character as if it were something of a different character, merely because in money result the two would come to the same thing: per Rowlatt J. in *Thompson* v. *Trust and Loan Co. of Canada.* (1) Income tax cases are in point.

---

(1) See note (1) ante, p. 552.

(2) [1903] 1 K. B. 494.

(3) Ibid. 504.

(4) [1930] 1 K. B. 107.

(5) [1929] 2 K. B. 85, 88.

[LAWRENCE J. But only for income tax purposes.]

[*Inland Revenue Commissioners* v. *Westminster* (*Duke of*), per Lord Tomlin (2), and *Hennell* v. *Inland Revenue Commissioners* (3) were also referred to.]

LAWRENCE J. The question that I have to decide in this case is as to the appropriate stamp duty to be paid upon a policy issued by the Commercial Union Assurance Company for securing payment of a sum of money by periodical instalments. The policy was issued upon a proposal which describes it as a proposal to secure the payment of a sum of money by periodical instalments, and states the total amount to be paid by instalments as 1149*l.* 10*s.*, and that the instalments are to be paid half-yearly, and that the proposer is to pay 1000*l.* That is the substance of the proposal. The policy itself states that the 1000*l.* had been paid by the proposer on August 7, 1936, and witnesses that the amount mentioned in the schedule, namely, the 1000*l.*, having been paid, the company would, subject to the provisos and the special conditions, make to the payee the payments mentioned on the dates specified without any deduction whatsoever except income tax in respect of such part of the payment as represented interest, and the schedule provides that 52*l.* 5*s.* should be paid half-yearly during the term of eleven years. The Commissioners have decided that this policy is a bond, covenant or instrument which falls within the exception to sub-s. 1 of that definition in Sch. I. to the Stamp Act, 1891, and therefore attracts the duty provided for by s. 60 as upon the sale of an annuity, and the main question that I have to

---

(1) [1932] 1 K. B. 283, 290.
(2) [1936] A. C. 1, 19.
(3) [1933] 1 K. B. 415.

1937

COMMERCIAL UNION ASSURANCE CO. v. INLAND REVENUE COMMISSIONERS.

Lawrence J.

decide is whether this policy was security for an annuity the original creation of which was by way of sale, and, if it was not, whether it is a security for the payment of an annuity by way of repayment within the meaning of s. 87, sub-s. 2, of the Act.

It has been argued on behalf of the appellants that the policy does not secure an annuity—that on the authority of cases which have been decided upon the Income Tax Acts as to the meaning of the word "annuity" this was not an annuity but was the repayment of the capital sum which was paid by the policyholder, and it is argued that that is clear upon the terms of the proposal and the policy itself, which never mentions the word "annuity" but speaks of the policy as securing the payment of a sum of money by periodical instalments, and, although it does not actually specify the amount or the rate of interest, it refers in the body of the policy to interest on the payments and speaks throughout—or at any rate speaks throughout the proposal—of payment by instalments of a sum of 1149*l.* 10*s.* in consideration of the payment of 1000*l.*

In my opinion the authorities upon the Income Tax Acts have no bearing upon the meaning of the word "annuity" in the definition of bond, covenant or instrument in the Stamp Act, 1891. The authorities to which reference was made, namely, *Secretary of State for India* v. *Scoble* (1); *Perrin* v. *Dickson* (2); and *Inland Revenue Commissioners* v. *Ramsay* (3), all refer to the question whether what were alleged to be annuities were taxable under the Income Tax Acts or attracted surtax. In my opinion, those cases have no bearing, because it has been laid down and it is clear that the Income Tax Acts only tax income, and therefore in taxing annuities they only tax annuities which are of an income nature and not a capital nature. That consideration has no application, in my opinion, to the Stamp Acts, and particularly having regard to the fact that the definition with which I have to deal contrasts annuity with a sum or sums of money at stated periods, and it has

(1) [1903] A. C. 299; 4 Tax Cas. 618.

(2) [1929] 2 K. B. 85; 14 Tax Cas. 608.

(3) (1935) 20 Tax Cas. 79.

been held upon that definition in the case of *Hennell* v. *Inland Revenue Commissioners* (1) that "annuity" in that definition means a payment which has reference to some yearly period or period which is a fraction of a year, and the other words, a "sum "or sums of money at stated periods," have reference to periods which have no reference to a year or fraction of a year; and therefore it seems to me, in the absence of any governing considerations such as are applicable to the Income Tax Acts, there is no ground for limiting the word "annuity" to annuities of an income nature.

I am, therefore, of opinion that this policy, which does refer to payments of a half-yearly nature, is a security for an annuity within the meaning of the definition. Then Mr. Donovan has argued that, even if that is so, it is not a security for an annuity the original creation of which was by way of sale, and he says that by virtue of s. 87, sub-s. 2, of the Stamp Act, 1891, the policy was a security for the payment of an annuity by way of repayment, and if it falls within that sub-section it is agreed that it attracts a lower rate of tax than the rate of tax which it would attract if it fell within the exception to sub-s. 1 of the definition of "bond, covenant or "instrument." In accordance with the principle which is stated by Lord Hanworth M.R. in *Hennell* v. *Inland Revenue Commissioners* (2) that "Where there is a .... charging Act, the meaning "of which is in doubt, it ought to be construed in favour of the "subject," I am of opinion that this case ought to be decided in favour of the appellants on the view that this policy was security for the payment of an annuity by way of repayment. As Romer L.J. said in *Inland Revenue Commissioners* v. *Ramsay* (3) regard must be had to the actual words used in dealing with these highly technical matters, and all the words of the proposal point to a repayment of a sum of money by periodical instalments; the amount to be paid by the proposer is mentioned, and the total amount to be paid by instalments is mentioned, and the capital sum and interest are referred to, though not specified in the policy itself.

(1) [1933] 1 K. B. 415.

(2) Ibid. 415, 421.

(3) 20 Tax Cas. 79, 98.

1937

COMMERCIAL UNION ASSURANCE CO. *v.* INLAND REVENUE COMMISSIONERS.

Lawrence J.

In those circumstances, it seems to me that the actual terms of the proposal and the policy are more aptly described by s. 87, sub-s. 2, than they are by the exception to sub-s. 1 of the definition of bond, covenant or instrument. I do not think it is necessary for me to indicate any view whether, if the income tax cases were applicable, this would be an annuity within the meaning of those Acts as construed by the authorities which have been cited, because I hold that those cases have no application to the construction of the word "annuity" in this context. I am, therefore, of opinion that the document should be stamped in accordance with the provisions of s. 87, sub-s. 2, of the Stamp Act, 1891, and the relevant part of the schedule, and I allow the appeal with costs.

Appeal allowed.

Solicitors for appellants: *Coward, Chance & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

W. L. L. B.

MITCHENER *v.* EQUITABLE INVESTMENT COMPANY, LIMITED.

1938
Jan. 13, 14.

[1936. M. No. 3966.]

Moneylenders—Loan secured by bill of sale—Memorandum of contract—No statement therein of particular statutory ground on which goods could be seized—Failure to state in memorandum all the terms of the contract—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *Schedule—Moneylenders Act*, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6.

By s. 6, sub-s. 1, of the Moneylenders Act, 1927, no contract for the repayment of money lent by a moneylender shall be enforceable unless a memorandum of the contract is made and signed by the borrower, and by sub-s. 2 the memorandum shall contain all the terms of the contract.

The plaintiff borrowed money from the defendants, moneylenders. The memorandum merely set out that the loan was secured by a bill of sale on the plaintiff's furniture.

The statutory form of such a bill of sale sets out that personal chattels thereby assigned shall not be liable to seizure for any other than five specified causes :—

Held, that the memorandum did not contain all the terms of the contract in that it did not specify upon which of the above grounds the goods could be seized, and that, therefore, the contract was unenforceable.

ACTION tried by Lawrence J.

The facts of the case are taken substantially from the judgment.

In 1928 Mr. Mitchener, the plaintiff, had had a draper's business which had been unsuccessful, and he was offered employment in an advertisement business as a traveller on condition that he put a sum of money into the business, and he was anxious to borrow money for that purpose. Having seen an advertisement in the newspapers, he got into touch with the defendant company. The latter were fully informed by Mr. Mitchener of his circumstances and of the object of his borrowing money. They sent down one of their directors to investigate and to see Mr. Mitchener's house and furniture, in order to decide what money, if any, they would lend. The director inspected Mr. Mitchener's house, and inspected and made an inventory of the furniture, and afterwards offered to lend Mr. Mitchener 110*l.* The furniture had been bought by Mr. Mitchener between 1920 and 1924, and had cost 300*l.* The offer of the defendant company was conditional on Mr. Mitchener giving a bill of sale upon his furniture. The loan was then made for 110*l.* secured by a bill of sale upon the furniture in Mr. Mitchener's house at Dulwich, and the rate of interest specified in the contract was 40 per cent. per annum. The loan was to be repaid at the rate of 6*l.* per month, the balance being repayable at the end of twelve months. At the end of the first twelve months Mr. Mitchener was unable to repay the balance, and it was agreed that the contract should be renewed, the balance, 68*l.*, being treated as owing and forming part of the new loan of 110*l*; so that Mr. Mitchener received at the end of the first year not a fresh 110*l.*, but 110*l.* less the balance of the previous loan, i.e. only 42*l.* new money, and the rate of interest continued at the same figure. These contract renewals of this loan of 110*l.* continued yearly from 1928 up to 1936. The memoranda of the first contract and of the second contract, signed by Mr. Mitchener, contained statements that the loan was secured by bill of sale on the furniture, and that the principal sum should be repayable at the end of twelve months. The memoranda of the last five transactions were in the same form and merely stated that the advance was to be secured by bill of sale, but gave no details. In 1936 Mr. Mitchener got into arrears with the 6*l.* monthly payments, apparently because he had taken advice and had been advised to dispute the contract. The defendant company thereupon threatened to exercise their power of seizure under the bill of sale.

The plaintiff claimed a declaration that the contract was unenforceable, an injunction restraining the defendant from enforcing it, and a declaration that the bargain was harsh and unconscionable.

A. A. Pereira for the plaintiff. It was not a sufficient compliance with s. 6 of the Moneylenders Act, 1927 (1), merely to state in the memorandum that the advance is secured by bill of sale, because the latter contained an onerous term not in the contract: per Scrutton L.J. in *Reading Trust, Ld.* v. *Spero* (2), i.e. the power of seizure. No doubt mention therein of the bill of sale would convey to the borrower, who must be assumed to know the law, that such power existed by virtue of s. 7 of the Bills of Sale (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). (3) But that section confines the right to five different causes, and nothing in the memorandum would inform the borrower which of these powers was incorporated in the contract. It is true that sec. 9 says that a bill of sale given by way of security for the payment of money must be made in the form set out in the schedule, but that carries the matter no further, for the form in the schedule only says that goods cannot be seized for any cause other than those specified in s. 7 of the Act of 1882. The dictum of Scrutton L.J. (2) was followed in *Westrup* v. *Equitable Investment Co.* (4) by Branson J., who took the view that failure to set out in the memorandum what were the rights of seizure invalidated the contract, and

---

(1) By the Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6, sub-s. 1: "No contract for the "repayment by a borrower of "money lent to him or to any "agent on his behalf by a money-"lender after the commencement "of this Act or for the payment "by him of interest on money so "lent and no security given by the "borrower or by any such agent "as aforesaid in respect of any "such contract shall be enforce-"able, unless a note or memoran-"dum in writing of the contract be "made and signed personally by "the borrower, and unless a copy "thereof be delivered or sent to "the borrower within seven days "of the making of the contract ". . . ."

Sub-s. 2: "The note or me-"morandum aforesaid shall con-"tain all the terms of the contract ". . . ."

(2) [1930] 1 K. B. 492, 505.

(3) By s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than five specified causes.

By s. 9 a bill of sale given as security for payment of money must be in the form set out in the schedule.

That form provides "that the "chattels hereby assigned shall "not be liable to seizure . . . . "for any cause other than those "specified in section 7 of the Bills "of Sale Act (1878) Amendment "Act, 1882."

(4) Unreported, Nov. 12, 1937.

Lewis J. in *Stewart-Naylor* v. *London & Westminster Loan & Discount Co., Ld.* (1) took the same view.

The memoranda in the different transactions also failed to set out that the loan was repayable as to balance of principal and interest on a specified date, namely, at the end of twelve months. The contract disclosed in the memorandum was essentially different from the real contract. Nothing in the memorandum indicated to the borrower that he was not entitled to go on liquidating the debt by the monthly payments of 6*l.* until it was paid off. In fact, under the contract, he could not pay off the debt in twelve months in any of the transactions, and a balance would always be due at the end of the current period of twelve months, payable forthwith.

The transaction was harsh and unconscionable, 40 per cent. per annum being charged where there was ample security: *Verner-Jeffreys* v. *Pinto.* (2)

Douglas Potter (*Cyril Salmon* with him) for the defendant. By s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, these bills of sale must be in a certain form, and that form gives a power of seizure of the goods. The borrower is bound to know the law, and would, from the statement that the debt was secured by a bill of sale, know that there was this power of seizure, therefore that was not " an onerous term not in the contract " referred to in the dictum of Scrutton L.J. (3) In any case, that was obiter. It is true that both Branson J. and Lewis J. followed that dictum as stated above. But this Court is not bound by those decisions: *Green* v. *Berliner.* (4)

With regard to the contention as to the repayment of the loan at the expiration of twelve months, it is contended that that provision was subsequently varied, and that, in fact, the memorandum sets out the true contract.

The contract was not harsh and unconscionable; the plaintiff was a business man borrowing money to put into a business, and was content to borrow on these terms for some eight years. The furniture was a decreasing security.

---

(1) Unreported, Dec. 20, 1937.

(2) [1929] 1 Ch. 401.

(3) [1930] 1 K. B. 492, 505.

(4) [1936] 2 K. B. 477, 493.

[*Carringtons, Ld.* v. *Smith* (1) and *Reading Trust, Ld.* v. *Spero* (2) were also referred to.]

A. A. Pereira replied.

LAWRENCE J. The circumstances of this case are as follow: [His Lordship set out the facts as set out above, and continued:] The ground upon which it is said that the contract is unenforceable is that none of the memoranda of the contracts contains any statement as to the power of seizure and sale under the bill of sale, which is said to be an infringement of the Moneylenders Act, 1927, s. 6, sub-s. 2 of which provides that the note or memorandum shall contain all the terms of the contract, and reliance is placed on the judgment of Branson J. in *Westrup* v. *Equitable Investment Co., Ld.* (3), in which he held, following what he considered to be the view of Scrutton L.J. in *Reading Trust, Ld.* v. *Spero* (4), that where the bill of sale contains an onerous term not set out in the contract it may be that the contract is invalidated. The contract in that case was similar to this moneylending contract, in which the memorandum did not specify the power of seizure and sale under the bill of sale, and Branson J. held that it was a memorandum which infringed s. 6 of the Moneylenders Act, 1927, because it did not contain an onerous term which was in the bill of sale, and that the mere reference in the memorandum to the fact that the loan was secured by a bill of sale was not sufficient to comply with the terms of the statute. That judgment of Branson J. has been followed by Lewis J. in *Stewart-Naylor* v. *London & Westminster Loan & Discount Co., Ld.* (5), and, I believe, in another case. (6)

It was argued on behalf of the defendant company by Mr. Potter in his able argument that I am not bound by these decisions, and that I ought not to accede to their reasoning,

(1) [1906] 1 K. B. 79.
(2) [1930] 1 K. B. 492.
(3) Unreported, Nov. 12, 1937.
(4) [1930] 1 K. B. 492, 505.
(5) Unreported, Dec. 20, 1937.
(6) *Egan* v. *Langham Investments, Ld.* [1938] 1 K. B. 667.

on the ground that the memorandum does state that the loan is secured by a bill of sale, and that the Bills of Sales Acts provide that the bill of sale shall be in a certain statutory form, which form provides that no other powers of sale than those which are specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, may be incorporated. In my judgment that does not meet the point which was decided by Branson J., because, though it is perfectly clear that a person who had before him a copy of the memorandum which stated that the loan was secured by a bill of sale would know, if he knew the law, as he is bound to know it, that no other power of seizure than one of those specified in s. 7 of the Act could be incorporated, he would not know which power of seizure was incorporated in the bill of sale unless he saw the bill of sale. As those powers of seizure and sale are most material for the borrower to know, in my judgment it is an infringement of s. 6 of the Moneylenders Act, 1927, not to specify in the memorandum the power of seizure and sale which the bill of sale referred to in the memorandum contains. In this case it is clear that in all the memoranda of contracts there was no particular recitation of the powers of seizure contained in the bill of sale, and I am therefore of opinion that the contract is unenforceable.

There is a second ground upon which it is said that the contract is unenforceable. After the first two contracts, namely, the first contract and the renewal after the first year, the memorandum specified that the loan was repayable by instalments of 6*l.* per month, and did not state that the balance was repayable at the end of twelve months. It was argued for the plaintiff that that was not the true contract, and that, therefore, the memorandum did not state the terms of the contract. The defendants contended, without calling any evidence, that the true contract was that stated in the memorandum, namely, that the loan should be repayable after the first two years by instalments of 6*l.* per month, and that there was no term that the balance should be repayable at the end of twelve months. Mr.

1938

MITCHENER
v.
EQUITABLE
INVESTMENT
Co.

Lawrence J.

Mitchener's evidence, which I accept, was that no such alteration of the contract was ever communicated to him; and the accounts, and the way in which the contract was carried out show no alteration at that time. On the first renewal he was treated as owing the balance, and on each subsequent renewal he was treated as owing the balance, and he never received 110*l.* on the renewal; he only received on each occasion 110*l.* less the sum owing on the previous contract. I find, therefore, that the contract was never varied in the way suggested by the defendant company. It follows from that that the memoranda of the last five contracts do not state the terms of the contract and are unenforceable for that reason. That is sufficient to decide the case so far as the declarations and the injunction are concerned. There will be a declaration that the contract is unenforceable and an injunction restraining the defendants from seeking to enforce it.

[His Lordship further held that the contract was harsh and unconscionable and must be reopened, upon the basis that the plaintiff should pay 25 per cent. interest for the first two years, and 15 per cent. thereafter.]

Solicitors for plaintiff: *Tudor & Rowe.*
Solicitor for defendants: *H. Davis.*

W. L. L. B.

1938
April 7.

UNITED STEEL COMPANIES, LIMITED *v.* CULLINGTON (INSPECTOR OF TAXES).

Revenue—Income Tax—Companies—Amalgamation—Deductions—Losses—Wear and Tear Allowances—Right to carry forward—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., rr.* 6, 11—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *ss.* 32, 33—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 153, 154.

The appellant company was incorporated in 1930, the main object being to acquire the undertakings of and to amalgamate two steel companies on the terms of a scheme sanctioned under order of Court under the Companies Act, 1929, ss. 153 and 154. The scheme was carried out and the undertakings and properties of the two component companies were vested in the appellant company in return for shares, the two companies being dissolved.

The businesses of the two companies had been carried on at a loss for several years before the amalgamation in 1930 and these businesses were afterwards carried on without interruption in the name of the appellant company. For the years 1936–37 the appellant company claimed to set off against its assessment for income tax (*a*) the accumulated losses and (*b*) wear and tear allowances of the two component companies for the years prior to the amalgamation in 1930, in accordance with Rule 6 of the Rules applicable to Case I. of Sch. D of the Income Tax Act, 1918, notwithstanding Rule 11 of the same rules as amended by the Finance Act, 1926, s. 32:—

Held, that the appellant company was entitled to deduct the allowances for wear and tear, but not for losses, in respect of the component companies during the years before the amalgamation. Rule 11 is a rule of computation only and does not affect Rule 6, which is a rule of charge; as amended by the Finance Act, 1926, s. 32, it was designed to alter the method of assessment in cases where there was a succession to a trade, profession or vocation, and not to take away the existing rights of the successor under Rule 6.

CASE stated by Commissioners for Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on February 25, 1937, the United Steel Companies, Ld. (hereinafter called " the company "), appealed against an assessment to income tax in the sum of 690,000*l.* less 175,000*l.* wear and tear for the year ending April 5, 1937. The assessment was made under Case I. of Sch. D of the Income Tax Act, 1918, in respect of the company's profits as steel manufacturers.

The company was incorporated under the Companies Act, 1929, on August 22, 1930, with a capital of 6,650,000*l.* divided into 6,650,000 ordinary shares of 1*l.* each. The primary object of the company was to acquire and amalgamate the undertakings and all or any of the properties, assets, rights, powers, debts, liabilities, and duties of the United Steel Companies, Ld. (hereinafter called "the 1918 Steel "Company"), and United Strip and Bar Mills, Ld. (hereinafter called the "Strip Company"), on the terms of a scheme of arrangement and amalgamation dated June 20, 1930, which was sanctioned by an order of the High Court of Justice dated August 16, 1930, and made pursuant to the Companies Act, 1929, ss. 153 and 154.

The 1918 Steel Company was registered on March 25, 1918. The Strip Company was registered on February 14, 1920. The company was formed on August 22, 1930, in accordance with para. 1 of the scheme as sanctioned by the Court, and thereupon the properties, rights and powers of every description and all the debts, liabilities and duties of the 1918 Steel Company and the Strip Company were without further act or deed transferred to and vested in the company.

On August 22, 1930 (the date of the incorporation of the company), there were issued and outstanding the shares and securities of the 1918 Steel Company and the Strip Company set out in the scheme. Shares of the company were duly issued to the holders of shares and securities of the 1918 Steel Company and the Strip Company in accordance with the said scheme and order. The order provided that the 1918 Steel Company and the Strip Company should within seven days after the date of the order cause office copies of the order to be delivered to the registrar of companies and that at the expiration of three months from the date of delivery the companies should be deemed to be dissolved. Copies of the order were duly delivered.

The businesses carried on by the 1918 Steel Company and the Strip Company were continued by the company from

August 22, 1930, and the books of account of those companies were not closed on that date nor were statements of account rendered to their customers or suppliers as on that date. Both manufacture and accounting were carried on throughout that day and subsequently in the name of the company. The businesses which had, before August 22, 1930, been carried on by the 1918 Steel Company and the Strip Company were treated as from that date as branches of the company. In respect of the business carried on by the Strip Company and subsequently by the company separate books of account were kept from February 14, 1920, to June 30, 1932, but without any break at August 22, 1930. The Strip Company commenced trading on December 1, 1921, and the separate accounts (made up to June 30 in each year) showed annual losses from that date until June 30, 1931. Consequently effect could not be given to the deduction for wear and tear of plant to which the Strip Company was entitled under Rule 6, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918.

The deductions for wear and tear of plant to which the Strip Company was so entitled under the said Rule 6, sub-r. 1, but in respect of which relief could not be given, for the years ending April 5, 1923–30 and for the period April 5, 1930, to August 22, 1930, amounted to 448,850*l.*

The trading losses (as computed by the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, and reduced to the extent that relief was given under s. 34 of the said Act) of the business carried on by the Strip Company up to August 22, 1930, in respect of which relief could not be given to that company amounted to 44,091*l.* and the losses of the 1918 Steel Company for which relief had not been given amounted to 90,729*l.*, making in all a total sum of 134,820*l.*, in respect of which the company claimed relief from the assessment under appeal.

On August 10, 1928, the 1918 Steel Company made with the Board of Inland Revenue an arrangement whereby the liabilities and claims of the 1918 Steel Company in respect of income tax, excess profits duty and corporation profits tax subsisting as at April 5, 1927, were satisfied. Consequently the first year of assessment of the 1918 Steel Company which fell to be considered for the purposes of this case was the year ended April 5, 1928. The 1918 Steel Company's income from its trade for that year was computed by reference to the 1918 Steel Company's accounting year ended June 30, 1926. The profits and losses (as computed by the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918) of the business carried on without interruption by the 1918 Steel Company and by the company did not give rise to a charge for tax for the years ended April 5, 1928, to 1936 either because there were no profits or because the profits were less than the deductions to which the company was entitled under Rule 6, sub-r. 1, of the said Rules in respect of wear and tear of plant and machinery.

The company claimed that under the circumstances hereinbefore set forth it was entitled to set off against its own profits all the allowances for wear and tear and for losses carried forward which the 1918 Steel Company and the Strip Company would have been entitled to carry forward against future profits if they had continued to carry on trade.

It was contended (inter alia) on behalf of the company:—

(*a*) That by virtue of the order of the Court dated August 16, 1930, the rights as well as the property of the Strip Company and the 1918 Steel Company were vested in the company without further act or deed;

(*b*) That the rights conferred by Rule 6 of the Rules applicable to Case I. of Sch. D of the Income Tax Act, 1918, and by the Finance Act, 1926, s. 33, were among the rights so vested in the company;

(*c*) That in accordance with the said order the businesses carried on by the 1918 Steel Company and by the Strip Company respectively were not discontinued but were continued without interruption in the name of the company, which did not set up a new trade or business;

(*d*) That in these circumstances Rule 11 of the Rules applicable to Cases I. and II. of Sch. D (as amended by s. 32 of the Finance Act, 1926) was not applicable, and its application would be inconsistent with the intention of the Companies Act, 1929, ss. 153, 154, and of the order of the Court made in pursuance of those sections ;

(*e*) That the liability of the company for income tax for all years should be computed throughout by reference to the profits or losses of the year preceding the year of assessment with the right to set off against the assessment for 1936–37 any losses and wear and tear allowances which became available by that method of computation, whether such losses and allowances arose from the 1918 Steel Company, from the Strip Company, or from the company.

It was contended (inter alia) on behalf of the Crown that :—

(*a*) the company on August 22, 1930, succeeded to the trades of the 1918 Steel Company and the Strip Company within the meaning of the new Rule 11, sub-r. 2, substituted by the Finance Act, 1926, s. 32 ;

(*b*) the company therefore fell to be assessed as if a new trade had been set up or commenced on August 22, 1930 ;

(*c*) the company was not entitled to set off against its own profits the allowances for wear and tear and losses in respect of which relief could not be given to the 1918 Steel Company and the Strip Company at the date of the incorporation of the company ;

(*d*) the reliefs to which the company was entitled under the Income Tax Acts are in no way affected by the terms of the order or the Companies Act, 1929.

Having considered the arguments and evidence adduced before them, the Commissioners found that the company succeeded on August 22, 1930, to the trades previously carried on by the 1918 Steel Company and the Strip Company and fell to be assessed as if a new trade had been set up or commenced on that date. They held that the company was not entitled to the wear and tear allowances or losses to which the 1918 Steel Company and the Strip Company were entitled at the date when the company was incorporated, i.e., August 22, 1930.

Sir William Jowitt K.C. and *W. Gordon Brown* (*Raymond*

1938

UNITED STEEL COMPANIES v. CULLINGTON.

Needham K.C. and *J. S. Scrimgeour* with them) for the company (appellants).

Sir T. O'Connor S.-G. and *R. P. Hills* for the Crown (respondent).

The arguments of counsel and citations from the Income Tax Acts and Rules appear sufficiently in the judgment of Lawrence J.

LAWRENCE J. In this case the question is whether the appellant company, a new company, which amalgamated under the Companies Act, 1929, the 1918 Steel Company and the Strip Company, is entitled to deduct allowances for (*a*) wear and tear, and (*b*) losses, of the constituent companies for the years before the amalgamation. This question turns primarily upon the construction of Rule 11, which is contained in the Finance Act, 1926, s. 32.

The two constituent companies, that is to say the 1918 Steel Company and the Strip Company, have had losses in the past and have, I think, never made profits, and in these circumstances wear and tear allowances had accumulated. It is contended on behalf of the appellant company that it is entitled to carry forward and to have the benefit of those allowances of its constituent companies for wear and tear and for losses, both under Rule 11 as amended in the Finance Act, 1926, and also by reason of the Companies Act, 1929, ss. 153, 154, under which the appellant company was created. The question of losses, whilst not being abandoned, was not pressed by Sir William Jowitt, and I formed the view that that claim could not be substantiated, turning as it does upon the Finance Act, 1926, s. 33, which does not relate in any way to a succession, and seems to confer merely a personal right upon the person who is carrying on the trade.

The main question as to the wear and tear allowances depends upon the construction of Rule 11, and it is important to consider the state of the law before and after 1926. In this connection Sir William Jowitt points out that the rule which deals with the wear and tear allowances is not a rule of computation, but is a charging rule.

Before 1926, when income tax was assessed and computed upon the basis of the three preceding years, Rule 6 of the Rules applicable to Cases I. and II. of Sch. D provided (sub-r. 1): "In charging the profits or gains of a trade under "this Schedule, such deduction may be allowed as the com-"missioners having jurisdiction in the matter may consider "just and reasonable, as representing the diminished value by "reason of wear and tear during the year of any machinery "or plant used for the purposes of the trade and belonging "to the person by whom it is carried on." That is a deduction which is to be allowed by the Commissioners during the year of charge and in respect of that year and has no relation to the three preceding years, which are years upon which the computation to tax is based. By the same rule (sub-r. 3) it was provided that, where the full effect could not be given to such deduction because there were not profits sufficient to permit of the deduction, the deduction might be carried forward. Rule 9 provided that, where there was a succession to a trade, the Commissioners might adjust the assessment by charging the successor with a fair proportion of the assessment from the time of his succeeding to the trade, profession, or vocation, and relieving the person originally charged from a like amount. Rule 11 then provided that on changes of proprietorship the tax payable by the person or persons who carry on the trade, profession, or vocation, after the change should, notwithstanding the change, be computed according to the profits and gains of the trade, profession, or vocation during the period prescribed by the Income Tax Act.

The effect of those Rules before 1926 was, that where there was a change of proprietorship and a succession, the tax would be computed by reference to the three years previous to the year of assessment and would be assessed upon the predecessor, and an adjustment would be made with reference to the time during which the successor continued to trade. In those circumstances the question was brought before the Courts in Scotland whether the carry forward of the wear and tear allowance would apply to a successor, and it was held in

Scottish Shire Line, Ld. v. *Lethem* (1) that the provisions of Rule 6, sub-r. 3, did so apply.

After 1926, Rule 6 remained in its original form, and Rule 11 was altered, providing (sub-r. 1) for the case of partnerships where one or more persons, who until the change of partnership have been engaged in the trade, continue to be engaged therein, that the tax payable by the person or persons who carry on the trade after that time shall, notwithstanding the change, be computed according to the profits and gains of the trade, profession, or vocation, during the period prescribed by the Income Tax Acts ; that is to say, the rule there uses the same words as the original Rule 11, but the period prescribed by the Act of 1926, instead of being three years previous, was one year previous. The rule goes on to provide that where all the persons who were engaged in the trade, both before and after the change, wish to do so, they can send the surveyor a notice requiring that the tax payable "shall be computed as if the "trade, profession or vocation had been discontinued at the "date of the change, and a new trade, profession or vocation "had been then set up or commenced, and that the tax so "computed for any year shall be charged on and paid by such "of them as would have been charged if such discontinuance "and setting up or commencement had actually taken place." That gave to members of a partnership a different option from that which had been given to them by the original Rule 11. Sub-r. 2 of Rule 11 deals with successions other than partnerships where some of the partners remain the same, and provides that if any person succeeds to a trade "which until that time "was carried on by another person . . . . the tax payable for "all years of assessment by the person succeeding as aforesaid "shall be computed as if he had set up or commenced the trade, "profession or vocation at that time, and the tax payable for "all years of assessment by the person who until that time "carried on the trade, profession or vocation shall be computed as if it had then been discontinued."

It is argued for the Crown that the effect of sub-r. 2 of Rule 11 (1926) is that on a succession the person who succeeds is to be

(1) (1912) 6 Tax Cas. 91 ; 1912 S. C. 1108.

taxed exactly as if he had not succeeded, but had set up an entirely new business, and that the effect of that is to exclude any right which he would previously have had under Rule 6, sub-r. 3, to carry forward the wear and tear allowance. As Sir William Jowitt has pointed out, Rule 11 relates to the computation of tax and provides for computation in accordance with the terms of the Act of 1926 and for assessment both upon the predecessor and the successor in case of a succession. He contends that it does not affect in any way Rule 6, which is really a charging section, entitling the taxpayer to a deduction in respect of wear and tear allowance by reference not to the year of computation but to the year of assessment; he points out that there is a marked contrast between the words of Rule 11, sub-r. 2, and the words of Rule 11, sub-r. 1, in the proviso; for whereas in sub-r. 2 the words are "If at any "time .... any person succeeds to any trade .... the tax "payable .... shall be computed as if he had set up or commenced the trade," the words of the proviso of sub-r. 1 are "that the tax payable .... shall be computed as if the "trade, profession or vocation had been discontinued at the "date of the change and a new trade, profession or vocation "had been then set up or commenced."

It is argued that if the intention had been to do away altogether with the doctrine of succession so as to make a complete division for all purposes at the point where the successor took on the trade, it would have been natural and simple to have used the words "as if he had set up or com"menced a new trade"; whereas the words used "as if he had "set up or commenced the trade" grammatically apply to the trade to which the person has succeeded: and that as there is, according to the contention of the appellant, ample to satisfy the meaning of sub-r. 2 in that it alters the Rules as to assessment and as to computation in the case with which it is dealing, it is not right to construe that sub-section as applying to Rules of charge such as Rule 6, with results of such very great importance.

In my judgment the argument for the appellants is correct. No meaning has been suggested for the contrast between the words used in the proviso to Rule 11, sub-r. 1, and the words used in Rule 11, sub-r. 2, and I cannot think that the Legislature, if it had intended to effect so great a change with reference to the carry forward of the wear and tear allowance, would have effected that change by words which do not expressly refer to the subject at all, and which are amply satisfied by the meaning to which I have already alluded.

It was contended for the Crown that Rule 11, sub-r. 2, refers back to Rule 1, sub-r. 2, which provides that where a trade has been set up and commenced within the year preceding the year of assessment, the computation shall be made on the profits or gains "for one year from the period of the "first setting up of the same, and where it has been set up and "commenced within the year of assessment, the computation "shall be made according to the rules applicable to Case VI.," and it is no doubt true that Rule 11, sub-r. 2, does provide for that method of computation. But that does not, in my opinion, throw any light upon the contrasted words to which I have referred in Rule 11, sub-r. 2, and Rule 11, sub-r. 1, and it does not in any way affect the force of the argument that these are rules of computation, whereas the deduction of wear and tear allowance is a rule of charge.

The Crown also relied upon the terms of the judgments in the case of the *Scottish Shire Line, Ld.* v. *Lethem* (1), where Lord Dundas said: "The Crown has treated the appellant "company as the old company by taking that company's "profits during the preceding years as the basis for assessing "the appellants' profits for 1910. I think it would be "anomalous if we were to permit the Crown to treat the "appellants as a new and different concern when it comes to "the matter of the wear and tear deduction." They referred also to Lord Salvesen's judgment, where he said: "Even "in a taxing statute it is legitimate to consider which of "two possible constructions is most in accordance with the "spirit and intention of the Act. Now the appellants "admittedly fall to be assessed for income tax exactly on "the same footing as the Elderslie Company, to whose "concern they succeeded. If so, can any reason be suggested

(1) 6 Tax Cas. 91, 98, 99.

"why they should not be entitled to the same deductions "from those profits as their predecessors, had they remained "in business, admittedly would have been?" Those observations were not, I think, the main basis of the judgments and I do not think that they alter in any way the view which I take of the construction of the Act of 1926. In my opinion, as I have said, Rule 11, as amended by s. 32 of that Act, was introduced to alter the method of assessment and the periods of computation where there was a succession, and it was not introduced for the purpose of altering the other rights of a successor; and when I read Rule 11 in conjunction with Rule 6, which still stands in the statute, it appears to me to have no effect upon the right of a successor to carry forward the wear and tear allowance of his predecessor.

The other argument which was addressed to me on behalf of the appellant, was that by virtue of the Companies Act, 1929, ss. 153, 154, the amalgamated company really represents the two constituent companies and is entitled to any rights which they may have had under Rule 6 to carry forward wear and tear allowances. I cannot accede to that argument because I do not think the general terms of the Companies Act, 1929, indicate any intention to vary the terms of the Income Tax Acts relating to succession; and, although a company which amalgamates other companies under the Act of 1929 does in effect fuse them, it is still a distinct legal persona and does not, in my judgment, acquire thereby any greater rights than a successor of another type.

I therefore hold that, if the construction which I have put upon Rule 11, sub-r. 2, is incorrect, the appellant company would not by virtue of its creation under the Act of 1929 be entitled to the carry forward of this wear and tear allowance. For these reasons upon the main contention I am unable to concur in the judgment of the Commissioners, and the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy.*
Solicitor for respondent; *Solicitor of Inland Revenue.*

F. P. F.

SHIRVELL *v.* HACKWOOD ESTATES COMPANY, LIMITED.

C. A.
1938
Jan. 26, 27; *March* 7.

Landlord and tenant—Tree partly dead growing on landlord's adjoining land with branch overhanging tenant's land—Servant of tenant killed by fall of branch—Compensation paid by tenant to widow of deceased servant—Action by tenant against landlord for indemnity or damages—Liability of landlord—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 30, *sub-s.* 2.

By a tenancy agreement dated January 20, 1936, the then owner of an estate let part of it to a tenant, himself remaining in occupation of the adjoining land. On February 10, 1936, a purchaser acquired the estate subject to the lease and became the owner and occupier of the adjoining land. On that adjoining land near the boundary of the demised land there was a beech tree which was in a dying condition and already dead from a height of about 16 ft. above the ground to its top, and a branch of that tree 40 ft. above the ground projected over the tenant's land. On May 30, 1936, that branch fell upon and killed a farm servant of the tenant who was at work upon his land. It appeared that at the date of the tenancy agreement there were many dead and dying trees on the estate, but that the risk of their branches falling had not become substantially greater by the date of the accident; and that in the meantime the owner had caused some of these trees to be cut down and was taking the advice of tree experts as to the best means of rendering the trees on the estate safe for all parties concerned. The tenant, having paid compensation under the Workmen's Compensation Acts, 1925 to 1934, to the widow of his deceased servant, alleged that the owner was the person legally liable for the accident, and brought an action against him under s. 30, sub-s. 2, of the Act of 1925 for an indemnity:—

Held, by the Court of Appeal, that the action could not be maintained for the following reasons—namely: that the tenant himself, if personal injury had been caused to him by the falling branch, could not have maintained an action against the owner inasmuch as, first (per Greer L.J. and Bennett J.), the owner was under no duty to the tenant to protect him against the risk of the branch falling, the tenant having taken the demised land without objection in the condition in which it was at the date of the tenancy agreement with the dead branch overhanging it, and secondly (per Greer and MacKinnon L.JJ., Bennett J. dissenting on this point), that, if the owner was under any such duty, he had taken reasonable care to discharge it; that the owner could be under no higher duty to the tenant's servant lawfully on the demised land or to the representative of such deceased servant than he was under to the tenant himself; that the fatal injury to the tenant's servant had not therefore been caused in circumstances creating a legal liability in the owner

C. A.

1938

SHIRVELL
v.
HACKWOOD
ESTATES
CO.

under the above mentioned sub-section; and consequently that the tenant as the person by whom the compensation had been paid was not entitled under that sub-section to be indemnified by the owner of the estate.

Robbins v. *Jones* (1863) 15 C. B. (N. S.) 221; *Cavalier* v. *Pope* [1906] A. C. 428, 430; and *Cheater* v *Cater* [1918] 1 K. B. 247 applied. *Cunard and wife* v. *Antifyre, Ld.* [1933] 1 K. B. 551 distinguished.

Where the injury for which compensation is payable under the Workmen's Compensation Acts, 1925 to 1934, was caused in circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employer on paying compensation is not disentitled to be indemnified under s. 30, sub-s. 2, of the Act of 1925 by the person so liable to pay damages by reason of the fact that, the injury having been a fatal injury, the compensation has been paid not to the workman but to a dependant of the workman.

Smith's Dock Co. v. *John Readhead & Sons* [1912] 2 K. B. 323 approved and followed.

APPEAL from the judgment of Greaves-Lord J. in an action tried by him without a jury.

By a tenancy agreement dated January 20, 1936, the Bolton Estate Company, Ld., the then owners of the Hackwood Estate, demised to Mr. Cornelius Shirvell a farm known as Hackwood Farm, which formed part of the Hackwood Estate, Basingstoke, Hampshire, of which Mr. Shirvell had been in occupation since 1918. The tenancy agreement contained a clause reserving to the landlords " All timber and other trees, "pollards, heirs and saplings; with right of entry to plant, mark, "fell, cut and carry away the same; . . . . "; and a clause by which the tenant undertook " To preserve all timber and "other trees, pollards, heirs, saplings and underwood from "injury by cattle or otherwise. Not to cut, top, lop, prune ". . . . or destroy any timber or timber-like trees. . . . . "

The demised land was bounded on the west side by adjoining land which formed part of the estate. The part of the demised land next to the boundary was a field known as Park Piece, and the part of the adjoining land on the other side of the boundary was a wood known as Pelican Wood.

At the date of the tenancy agreement there were many dead or dying trees in Pelican Wood and the other woods on the estate. Among these there was in Pelican

Wood near the boundary between that wood and the demised land a beech tree 60 or 70 ft. high which was in a dying condition and already dead from a height of 16 ft. above the ground upwards to its top, and a branch of that tree at a height of about 40 ft. above the ground projected over the demised land.

On February 10, 1936, the Bolton Company sold to another company called the Hackwood Estates Company, Ld., the Hackwood Estate including the said adjoining land and the reversion expectant upon the determination of the tenancy of the farm, and in that month the last-named company entered into possession of the estate. The Hackwood Estates Company, Ld., had been formed by and under the supervision of Lord Camrose, and the agent of that company was Mr. J. A. Daniel.

On May 30, 1936, William Robinson, a farm labourer employed by Mr. Shirvell, the tenant, was at work in the field known as Park Piece when the projecting branch above-mentioned fell, inflicting upon him injuries from which he died.

The widow of the deceased claimed compensation from Mr. Shirvell under the Workmen's Compensation Acts, 1925 to 1934, and on August 10, 1936, he paid into Court for the widow the sum of 273*l*.

On October 15, 1936, Mr. Shirvell brought the present action against the Hackwood Estates Company claiming indemnity under the Workmen's Compensation Act, 1925, s. 30, sub-s. 2, in respect of the compensation so paid by him.

The plaintiff in his statement of claim alleged (para. 5) that he claimed against the defendants an indemnity against the sum paid by him to the widow of the deceased on the ground that he had become liable to pay that sum by reason of the defendants' negligence; the particulars of that negligence being that the defendants permitted branches of the said tree to extend over the plaintiff's land; and permitted to be upon their land a dead tree without taking any or any adequate steps to make the same safe; (para. 6) that in the alternative the defendants were liable to the plaintiff in that they had and kept upon their land a tree which in its state of decay was dangerous, and which had caused damage to the plaintiff; (para. 7) that in the further alternative the tree in its said condition, which was well known or ought to have been known to the defendants, was a nuisance, and the defendants were liable to the plaintiff for the damage caused to him as aforesaid: And the plaintiff claimed:—(1.) a declaration that the defendants were liable to indemnify him against the sum paid by him to the widow of the deceased; (2.) payment of the said sum of 273*l.*

The defendants in their defence stated (inter alia) (para. 4) that they denied that they were negligent as alleged in para. 5 of the statement of claim; (para. 5) that they denied every allegation in paras. 6 and 7 of the statement of claim; (para. 6) that, in the alternative, if they were negligent as alleged, or if they had committed any of the acts set forth in paras. 6 and 7 of the statement of claim (each of which was denied), the said Robinson was guilty of contributory negligence in that he paid no heed to a warning given by the branch of the said tree making a noise by cracking; and that, further, Robinson was negligent in that he remained underneath the tree when he knew or ought to have known that the said branch was dead and/or likely to fall; (para. 7) that further or in the alternative if they had been negligent as alleged or if they had committed any of the acts set forth in paras. 6 and 7 of the statement of claim (each of which was denied) the plaintiff had been guilty of contributory negligence in that he well knew or ought to have known the condition of the said tree and gave no warning to the said Robinson or to the defendants' predecessors in title of the said condition; (para. 8) that further or in the alternative at the time of the accident, the subject-matter of the action, Robinson was an invitee upon the plaintiff's premises and the plaintiff had failed to render the premises reasonably safe by failing to take any steps either to cut down the said branch or to cause it to be cut down by reason whereof the plaintiff could not maintain this action; and in the alternative the plaintiff was the tenant of the defendants under a tenancy agreement dated January 20, 1936, and made between the plaintiff and the Bolton Estates Company, Ld. (the predecessors in title of the defendants), and the defendants were under no liability to the plaintiff in that at the time of that tenancy agreement the branches of the said tree extended over the plaintiff's land to an extent not less than at the date of the accident, and in that at the date of that tenancy agreement these branches were in the same condition as at the date of the accident; and that save as expressly admitted the defendants denied every allegation in the statement of claim.

The action was tried in March, 1937, by Greaves-Lord J. without a jury.

Evidence was given on behalf of the plaintiff by the plaintiff himself; by William Mansbridge, a labourer employed by the plaintiff, who was working with the deceased man at the time of the accident; and by Mr. Arthur D. C. Le Sueur, B.Sc., a member of the Arboricultural Committee, and a lecturer in forestry for the Royal Agricultural College, who stated that the tree in question was alive but not sound for 16 ft. above the ground, but that the rest of it was dead, that it might stand for fifteen years longer, but meantime branches would break off; that its appearance would indicate danger to any one who knew about forestry; that what had happened might have been expected, and that the fact that there were trees in this condition in Pelican Wood was sufficient to make it prudent for the owner of the wood to have it examined.

Evidence was given on behalf of the defendants by Mr. Daniel, their agent and manager, who said that the whole of the woods needed looking after, that he arranged with a Mr. White, a timber merchant of Barnstaple, for the services of two of his expert tree fellers, who worked from March 9 to April 25, that they started again and continued till after the accident, and that a tree expert, Captain R. C. L. Mould, was consulted and made a report; and by the said Captain Mould, a graduate of Cambridge, and a holder of a diploma in forestry, who stated among other things that he first went to Hackwood on March 20, 1936, and remained for two days and a half collecting material for a preliminary report, that he did not thoroughly inspect the trees on the estate before preparing his second or general report, that he did not specially notice the tree in question till the second time, that he first saw it after the accident, that he did not consider it to be in such a bad condition as many other trees on the estate, and that eleven months later it was still sound from the base 16 or 17 ft. up.

On March 15, 1937, Greaves-Lord J. gave judgment, observing that, after having considered all the circumstances of the case and the authorities cited, he had come to the conclusion that the only cause of action which the plaintiff in right of the deceased man could call in aid against the defendants was negligence and not nuisance, that on the evidence as a whole there was no substantial proof of negligence against the defendants, and that there must therefore be judgment for the defendants.

The plaintiff gave notice of appeal for an order that the judgment of the learned judge might be reversed, and that judgment might be entered for the plaintiff for 273*l.*

Harold Murphy K.C. and *C. L. Henderson* for the plaintiff, appellant. The plaintiff having paid compensation under the Workmen's Compensation Acts, 1925 to 1934, to the widow of his deceased servant Robinson, if the fatal injury in respect of which the compensation was payable was caused in circumstances creating a legal liability in the defendants, the plaintiff is entitled to be indemnified by the defendants under s. 30, sub-s. 2, of the Act of 1925. (1) The fatal injury

---

(1) Workmen's Compensation Act, 1925, s. 30: "Where the "injury for which compensation "is payable under this Act, ... "was caused under circumstances "creating a legal liability in some "person other than the employer "to pay damages in respect "thereof—

"(1.) The workman may take "proceedings both against that "person to recover damages and "against any person liable to "pay compensation under this "Act or such scheme for such "compensation, but shall not "be entitled to recover both "damages and compensation; "and

"(2.) If the workman has "recovered compensation under "this Act . . . . the person by "whom the compensation was "paid, ... shall be entitled "to be indemnified by the "person so liable to pay "damages as aforesaid, and all "questions as to the right to to the deceased in respect of which the plaintiff paid the compensation was caused in circumstances creating a legal liability in the defendants. The defendants owed a duty to the plaintiff and to any person lawfully on the farm which they had let to him to take reasonable care that the trees on their adjoining land which overhung the plaintiff's land were not in such a state of decay as to be dangerous in ordinary circumstances to the plaintiff or to any such person : *Cockburn* v. *Smith* (1) ; *Cunard* v. *Antifyre, Ld.* (2) ; and *Crowhurst* v. *Amersham Burial Board.* (3) The defendants also owed a duty to the plaintiff and his invitees to warn them of the dangerous condition of the overhanging branch in question. These duties are the more imperative in a case like the present in which the decayed condition of the projecting branch could be observed from the defendants' land and was known or ought to have been known to them, in which persons might naturally be expected to be and could indeed be seen to be lawfully on the part of the demised land which was under the projecting branch, and in which by the terms of the tenancy agreement the defendants have reserved to themselves the right to fell and cut all timber and other trees, and the plaintiff is deprived of the right to cut, lop, prune or destroy any timber or timber-like trees. The case of *Bruce* v. *Caulfield* (4) is distinguishable from the present case because in that case the tree on the defendant's land which fell on the plaintiff's adjoining land was a sound tree which was blown down by an exceptional gale. The case of *Noble* v. *Harrison* (5) is also distinguishable, because there the defendant had no knowledge that the branch was dangerous, its fall being due to a latent defect not discoverable by any reasonably careful inspection. The defendants failed to perform their duties of removing the dangerous branch or of warning the plaintiff and others of its condition, and the

---

"and amount of any such "indemnity shall, in default of "agreement, be settled by "action, or, by consent of the "parties, by arbitration under "this Act."

(1) [1924] 2 K. B. 119.
(2) [1933] 1 K. B. 551.
(3) (1878) 4 Ex. D. 5.
(4) (1918) 34 Times L. R. 204.
(5) [1926] 2 K. B. 332.

consequence of their negligence was that the branch fell upon and caused fatal injuries to the plaintiff's servant Robinson, who was lawfully upon the demised land. The fatal injuries to the deceased were thus caused in circumstances creating a legal liability in the defendants. The plaintiff paid compensation for these injuries to the widow of his deceased servant, and he is therefore entitled to be indemnified by the defendants under s. 30, sub-s. 2, of the Act of 1925.

H. I. P. Hallett K.C. and *G. J. Paull* for the defendants, respondents. The plaintiff's cause of action, if any, against the defendants is to be indemnified under s. 30, sub-s. 2, of the Workmen's Compensation Act, 1925, for the compensation which he has paid to the widow of his deceased workman, Robinson, for the fatal injuries to her husband, caused, as the plaintiff alleges, in circumstances creating a legal liability in the defendants for negligence. The fatal injury for which the plaintiff paid the compensation was not caused in circumstances creating a legal liability in the defendants. As to the allegation in the statement of claim that the fatal injury was caused in circumstances creating a liability in the defendants for nuisance, that was abandoned by the plaintiff at the trial of the action. As to the contention that the fatal injury was caused in circumstances creating a liability in the defendants on the principle laid down in the case of *Rylands* v. *Fletcher* (1), that contention cannot be sustained.

[GREER L.J. The Court does not require to hear argument to the effect that that principle is not here applicable.]

The fatal injury was not caused in circumstances creating any other legal liability in the defendants. The defendants' predecessors on letting the demised land to the plaintiff by the tenancy agreement of 1936, owed no duty to the plaintiff to take care that the trees on their adjoining land should be in so sound a state that a branch might not be liable to fall on the demised land. In the absence of fraud, a tenant takes the demised property in the state in which it is at the date of the demise with all its advantages and disadvantages, and the landlord is not liable to the tenant for loss or damage caused to him by some defect or peril existing at the date of the demise: *Erskine* v. *Adeane* (1); *Cheater* v. *Cater* (2); *Robbins* v. *Jones* (3); and *Cavalier* v. *Pope.* (4) These cases show that a landlord does not impliedly warrant that the demised property is free from all possible defects or dangers at the time of the demise. The duty of taking care to avoid doing injury which an owner of land owes to a tenant to whom he has let adjoining land is different from and less onerous than that which he owes to an adjoining owner to whom he is a stranger. The present case is therefore distinguishable from *Crowhurst* v. *Amersham Burial Board* (5), where landowners who allowed their yew trees to project over the land of an adjoining proprietor were held to be liable to the latter for the death of his horse by eating the yew leaves; and it is also distinguishable from *Cunard and Wife* v. *Antifyre, Ld.* (6), where the plaintiffs, who sustained damage from masonry falling from the defendants' premises on to their premises and were held entitled to succeed in their action, were not the tenants of the defendants but of an intermediate landlord to whom the defendants had let part of the premises. If a personal injury to the plaintiff himself by the fall of this projecting branch would not have been caused in circumstances creating a legal liability in the defendants towards the plaintiff, an injury to another person lawfully on the plaintiff's land, such as his invitee servant or guest, would not have been caused in circumstances creating a legal liability in the defendants towards that person; because the defendants could be under no greater liability to such a person than to the plaintiff himself: *Robbins* v. *Jones* (3) and *Cavalier* v. *Pope.* (7) It appears from the evidence that the tree from which this branch projected had not seemed to become more dangerous during the time which elapsed between the date of the tenancy agreement and the date of the accident, and the defendants are not therefore under any greater liability in respect of it than their

---

(1) (1868) L. R. 3 H. L. 330.

(1) (1873) L. R. 8 Ch. 756, 761.
(2) [1918] 1 K. B. 247.
(3) (1863) 15 C. B. (N. S.) 221.
(4) [1906] A. C. 428, 430.
(5) 4 Ex. D. 5.
(6) [1933] 1 K. B. 551.
(7) [1906] A. C. 428.

predecessors were at the commencement of the tenancy. As the fatal injury in respect of which the compensation was payable was not caused in circumstances creating a liability in the defendants to pay damages in respect thereof to the representative of the plaintiff's deceased servant, the plaintiff by having paid compensation to the widow of the deceased is not entitled under s. 30, sub-s. 2, of the Act of 1925 to be indemnified by the defendants in respect of the compensation so paid, and this action is not maintainable. If the plaintiff is entitled to maintain this action, he is doing so not in respect of an injury to himself but to his deceased workman or his representative, who can have no greater right against the defendants than the plaintiff would have had, and the defendants are entitled to set up against him all the defences which they might have set up in an action against them by the representative of the deceased workman: see *Cory & Son, Ld.* v. *France, Fenwick & Co., Ld.* (1) The plaintiff has been in occupation of the demised land since 1918, and during all that time this branch has projected over his land and he has had better opportunities than the defendants have had for observing its condition, and in these circumstances it was a condition precedent to a right of action by the plaintiff or his invitee against the defendants for damage done by the fall of the branch that he should have given the defendants notice that the branch was dangerous and needed lopping, and in the absence of any such notice this action cannot be maintained: *Morgan* v. *Liverpool Corporation* (2) and *Cockburn* v. *Smith.* (3) The only duty of the defendants was to take reasonable care that during the term of the demise nothing should occur on their adjoining land which might cause injury or damage to the demised land. It is a question of fact whether they took such care, and the evidence shows that they did so. It was the duty of the plaintiff and not of the defendants to cut the branch in question. The provisions in the tenancy agreement giving the defendants a right to cut trees and restraining the plaintiff

(1) [1911] 1 K. B. 114.
(2) [1927] 2 K. B. 131.
(3) [1924] 2 K. B. 119.

from doing so relate to trees growing on the demised land, and not to trees growing on the defendants' adjoining land. There is no express provision in the tenancy agreement giving the defendants a right to cut branches projecting over the plaintiff's land, or preventing the plaintiff from doing so; and in these circumstances the plaintiff had a clear right, without notice to the defendants, to cut the branches overhanging his farm of trees growing on the adjoining land of the defendants: *Lemmon* v. *Webb.* (1)

C. L. Henderson in reply. The principle of *Cheater* v. *Cater* (2) has no application to the present case, because the evidence goes to show that the tree in question was a sound tree in 1918 when the plaintiff's original tenancy began and did not become unsound and dangerous until after that date. Moreover, that principle could only be relied upon by the defendants in an action against them by the plaintiff for an injury to himself, and not in an action against them by the plaintiff under s. 30, sub-s. 2, of the Act of 1925, for an indemnity for compensation in respect of an injury to his servant: see *Paul* (*R. & W.*), *Ld.* v. *G. E. Ry. Co.* (3); and Willis's Workmen's Compensation (30th ed.), pp. 469, 470. Between February 10, 1936, when the defendants acquired the Hackwood Estate, and May 30, 1936, when the accident happened, the defendants had ample time and opportunity for discovering and remedying the condition of the trees on the boundary of their land or for giving the plaintiff notice of their condition, and they were negligent in failing to do so.

Cur. adv. vult.

1938. March 7. GREER L.J. This is an appeal by the plaintiff from the judgment of Greaves-Lord J. in favour of the defendants. The relevant facts are not in dispute, or hardly in dispute. On May 30, 1936, a labourer on the Hackwood Farm which adjoins part of the Hackwood Estates owned and occupied by the defendants, was working on a part of the farm which was near a beech tree the branches of which overhung the place where he was working. A branch fell from the beech tree and killed him, and his widow took proceedings against the plaintiff for workman's compensation and obtained an award of 273*l.* The plaintiff's claim was to be indemnified by the defendants as provided by s. 30 of the Workmen's Compensation Act, 1925.

---

(1) [1895] A. C. 1.

(2) [1918] 1 K. B. 247.

(3) (1920) 36 Times L. R. 344.

It had been held by Bray J. in *Smith's Dock Co.* v. *John Readhead & Sons* (1) that the right to indemnity extends to a case in which the person to whom compensation has been paid is a dependant of the deceased entitled to compensation under the Workmen's Compensation Acts. That decision has been frequently acted upon since. I think it is right, and this Court must act upon it in the present case. This case must be treated exactly as it would have been if the labourer Robinson had not been killed, but had himself asked for and received compensation.

The relevant facts may be summarized in the following way. On January 20, 1936, the defendants' predecessors in title by lease of that date let the Hackwood Farm to the plaintiff. Thereafter the defendants purchased the Hackwood Estate, on which there were a great number of trees growing, many of them dead or dying. The group of trees which adjoined the place at which the deceased was working is known as the Pelican Wood. There were large numbers of trees on other parts of the estate. On February 10, 1936, the defendants took possession of such part of the Hackwood Estate as had not been let to the plaintiff. They became the owners of the estate, and occupiers of the part which had not been let to the plaintiff and reversioners of the title to the farm. The defendant company had been formed by Lord Camrose and possibly some members of his family, probably for the purpose of avoiding by lawful means part of the taxation that would have to be paid by the owner and occupier of the estate. At this time the branch of the tree which overhung the part of the farm in which the deceased was working was, like a great many other trees on the estate, partly dead. I shall call the tree "tree 16," and the branch

(1) [1912] 2 K. B. 323.

which fell "branch 40." The numbers I am using have nothing whatever to do with the case; I only use them in order to avoid repeating such phrases as "the tree in question "in the action," and "the branch of the tree which by falling "caused Robinson's death." The manager of the estate for the defendants was a Mr. Daniel. It appears from the correspondence that the deceased's claim was put forward on his behalf by the Co-operative Insurance Company, Ld., but the estate being legally owned, not by Lord Camrose, but by the Hackwood Estates Company, Mr. Daniel as the agent of the defendants answered the letter and denied liability. In March, 1936, the defendants instructed a tree expert, Mr. R. C. L. Mould, to advise them as to what should be done with regard to the trees on the estate, and Mr. Mould seems to have treated Lord Camrose as the person really interested in the need for advice with regard to improving the woods on the estate from the point of view of their sporting value, and their value as an amenity of the estate. On March 20, 1936, Mr. Mould went down to see the trees on the Hackwood Estate for the purpose of making a report to the company, or to Lord Camrose, advising what ought to be done. Mr. Mould took about three days to survey the trees on the estate sufficiently to enable him to advise what should be done. In the meantime Mr. Daniel, the defendants' agent, had engaged a firm of tree fellers, Messrs. Whites, to do any work that could be done while Mr. Mould was engaged in preparing his preliminary report. On April 18 Mr. Mould signed his preliminary report and sent it to Lord Camrose in the letter of that date. He was then asked to prepare a scheme for carrying out the views expressed in his preliminary report. On May 5 he was told to go ahead with the preparation of his scheme, and on May 12 he went down to make a thorough examination of the trees on the estate. He took an assistant with him, and they were there for about three weeks, after which he produced his second report, which is dated June 26, four days before the accident to Robinson. Mr. Mould's advice in the second report contains the following rules in Part V, headed "Programme of Cultural Operations";

"2. The programme has been so arranged that birds in any "one block which is being worked during the winter, may "find at least one quiet wood in that block. 3. This rule "will not apply rigidly to Spring Wood and the Park, as the "removal of dead and dangerous trees must be given primary "consideration." Later on in the report he refers to "the "necessity of clearing the Park and Spring Wood of unsightly "and dangerous trees." Again on p. 71 of his second report Mr. Mould refers to the removal of trees dangerous to passers-by as one of the main objects of the scheme. It appears from the plan that Pelican Wood is part of the Park, and the words I have quoted from the report appear to show that Mr. Mould was alive to the importance of making the trees in the Park safe. There is other evidence which seems to me to make it quite clear that though nothing was mentioned in the written instructions which Mr. Mould received from the defendants, he was in fact told, possibly before his first report, certainly while he was being urged to prepare his second report, that he ought to have regard to the desirability of making the trees safe for people who were likely to be damaged by them or their branches. On p. 28 of the transcript of Mr. Daniel's evidence he was asked this question: "Was there any person employed by Hackwood "Estates between February and June, 1936, who was competent to detect a tree which was dangerous either because "of decay or for any other reason?" The answer he gave was: "Yes. Captain Mould was brought there for that express "purpose amongst other things." And Mr. Mould—in his evidence at p. 49 of the transcript says: "I consider that "I stressed in various places in both reports the necessity of "dealing with the dangerous trees. The great difficulty was "that there were so many it was difficult to know where to "start." And at p. 54 he says: "Lord Camrose was "interested to utilize the timber to the best advantage "naturally, like any other landowner would be, but he also "was interested, and mentioned it to me more than once, in "the necessity of making the park as safe as possible, and "the whole estate as safe as possible from a tree point of view."

I think the learned judge was entitled to hold on this evidence that before the unfortunate accident to the deceased man Robinson, Mr. Mould was instructed, in preparing his scheme, to advise Lord Camrose as to the best way of making the trees safe to all who were likely to be in danger from them. Tree 16 was not dead all the way from the root upwards, but it was dead from 16 ft. from the ground to its top. Branch 40 was in the dead part of the tree. It overhung Hackwood Farm when the plaintiff took his lease, and it was then on the part of the tree which was dead. It was dangerous and liable to fall, but the tree itself remained quite safe as a tree until November 13, when it was cut down.

I should add that at the trial the defendants' counsel abandoned the claim which does appear in the statement of claim based on nuisance, and in the end he agreed that the judge might treat Lord Camrose and the Hackwood Estates Company as if they were the same persons. They were in fact in law different persons, but I understand the admission to mean that any instructions given by Lord Camrose must be taken to have been given with the authority and on behalf of the defendants. If the plaintiff's counsel had persisted in his contention that they were different persons, and that any instructions given by Lord Camrose were unauthorized, he ought to have objected to the evidence given by Mr. Mould about it, and have maintained his contention that until it was proved that Lord Camrose had the authority of the company to instruct Mr. Mould, any evidence as to what he did or said was irrelevant. If he had not given up the point it probably would have been quite easy to prove that the directors, or such other persons as were entitled to represent the company, knew quite well that Lord Camrose was dealing with the question, and were content that he should do so. The appellants now raise the question which they abandoned at the hearing, and upon which if they had not abandoned it the defendants might have asked the judge to hear evidence, even after they had closed their case.

Mr. Hallett for the respondents supported the learned

C. A.
1938

SHIRVELL
v.
HACKWOOD
ESTATES
Co.

Greer L.J.

judge's judgment on a number of grounds on which I do not think it necessary to say anything, but I think he was entitled to hold the judgment on two of the grounds on which he relied.

The first of these grounds was that the plaintiff took the farm as it existed at the date of his lease without any right to complain of dangerous branches of trees overhanging the boundary of his farm, and that his employees had no better rights than he had. He cited in support of his argument *Cheater* v. *Cater* (1) ; *Robbins* v. *Jones* (2) ; and the speech of Lord Macnaghten in *Cavalier* v. *Pope.* (3) It is not necessary to state in detail the facts on which the decision in *Robbins* v. *Jones* (2) turned. It is sufficient to say that the claim was in respect of an accident happening in a private place, or alternatively in a place which was part of the highway. The Court consisted of Erle C.J., Willes J., Byles J. and Keating J., a Court which it is not an exaggeration to describe as a strong Court. In the course of his judgment Erle C.J. said : "If the passage over the area be considered as a private "way to the houses, then the reversioner is not liable, but the "occupier. A landlord who lets a house in a dangerous state, "is not liable to the tenant's customers or guests for accidents "happening during the term ; for, fraud apart, there is no "law against letting a tumble-down house ; and the tenant's "remedy is upon his contract, if any." Then he deals with the question as to the liability if the place where the accident happened was part of the highway.

In *Cavalier* v. *Pope* (3) Lord Macnaghten says : "The "law laid down by the Court of Common Pleas in the "passages quoted by the Master of the Rolls from the judgment "of Erle C.J. in *Robbins* v. *Jones* (2) is beyond question." Then he quotes the passage above cited. The judgment of the Master of the Rolls in *Cavalier* v. *Pope*, in the Court of Appeal (4), was approved by Lord Macnaghten in the House of Lords (3), and affirmed by the House. In his judgment the Master of the Rolls, Sir Henn Collins, after referring to

---

(1) [1918] 1 K. B. 247.

(2) 15 C. B. (N. S.) 221.

(3) [1906] A. C. 428, 430.

(4) [1905] 2 K. B. 757.

Lane v. *Cox* (1), continues: "It has been held," says Lord Esher M.R., "that there is no duty imposed on a landlord, "by his relation to his tenant, not to let an unfurnished house "in a dilapidated condition, because the condition of the "house is the subject of contract between them. If there "is no duty in such a case to the tenant, there cannot be a "duty to a stranger. There was, therefore, no duty on the "part of the defendant to the plaintiff, and there could be no "liability for negligence." The Court followed the authority of a passage in the judgment in *Robbins* v. *Jones* (2) delivered by Erle C.J., but prepared by Willes J.: "A landlord who "lets a house in a dangerous state is not liable to the tenant's "customers or guests for accidents happening during the "term; for, fraud apart, there is no law against letting "a tumble-down house."

The speeches of the other Lords in *Cavalier* v. *Pope* (3) make no reference to the law as laid down in *Robbins* v. *Jones* (2), but there seems to be clear authority for the proposition contended for by Mr. Hallett in the decisions of the Court of Appeal, in *Lane* v. *Cox* (1) and *Cavalier* v. *Pope* (3) and the approval by Lord Macnaghten, of the rule stated by the Court in *Robbins* v. *Jones*. (2) There is nothing in any of the other speeches in *Cavalier* v. *Pope* (3) which shows any disagreement with what Lord Macnaghten said. It seems to me that inasmuch as neither Robinson nor his widow could have succeeded in an action at common law against the defendants, it necessarily results that the plaintiff having paid the workman's compensation, is not entitled to the indemnity which he claims.

The appellants cited the case of *Cunard* v. *Antifyre, Ld.* (4), as an authority that a landlord retaining part of the premises in his own control is liable to his tenant and his tenant's licensee for damage occasioned by his negligence in allowing the part of the premises retained in his control to fall into disrepair and become dangerous. The headnote of that case reads as follows: "The defendants were the lessees and

---

(1) [1897] 1 K. B. 415.
(2) 15 C. B. (N. S.) 221.
(3) [1906] A. C. 428, 430.
(4) [1933] 1 K. B. 551.

C. A.
1938

SHIRVELL
v.
HACKWOOD
ESTATES
CO.

Greer L.J.

"occupiers of a building which they were liable to keep "in repair by the terms of their lease. The plaintiff, "Mr. Cunard, occupied a flat on the third floor of the building "with his wife, who was his co-plaintiff. This floor he held "on a monthly tenancy from one M. who in turn held the "second third and fourth floors from the defendants upon a "lease which contained a covenant by M. to keep the demised "premises in repair 'drains and roof and damage by fire "'excepted.' The effect of the various leases, as the Court "held, was that the main roof and guttering were vested in "the defendants as occupiers. The plaintiffs' flat included "a kitchen with a glass roof which projected beyond the back "wall of the fourth floor immediately above. In December, "1931, owing to the defendants' neglect to repair, a heavy "piece of guttering fell from the main roof of the building "through the glass roof of the plaintiffs' kitchen, causing "broken glass to strike Mrs. Cunard and injure her. The "plaintiffs claimed damages: *Held*, that the defendants as "occupiers were under a duty to take reasonable care that "the guttering should not fall, and that the plaintiffs as occupiers "of a flat in the same building should have been in their "reasonable contemplation as persons closely and directly "affected by neglect of that duty, and that the plaintiffs "were entitled to succeed. It is immaterial that the tenements "are part of the same structure. Causes of action in negligence "and nuisance distinguished."

The case was concerned with the liability to a sub-tenant of a landlord in respect of a part of the premises which he reserved for himself, but it does not appear that the dangerous condition of the roof was in existence at the time the lease was granted to the defendants tenant of the whole building, nor was the attention of the Divisional Court, which consisted of Talbot and Acton JJ., called to the distinction which in law exists between the liability of the occupier of property to an adjoining owner and his invitees or licensees, and the liability of such an owner to his tenants of part of his estate and his invitees or licensees. I do not think the case can be relied upon as in any way inconsistent with *Robbins* v.

Jones (1) and *Cavalier* v. *Pope* (2) referred to above. If it is so inconsistent, the decision was wrong and is not binding on this Court.

Inasmuch, however, as the point with which I have dealt was not raised at the trial it seems right that I should express my view on the only question which the learned judge considered—namely, ought he to have decided that the defendants in fact were liable for negligence in failing to discover that tree 16 and branch 40 were in a dangerous state, and in failing to remove the whole of tree 16, or in any case to deal with the part of it which was in fact dangerous. It was, I think, established beyond controversy that tree 16 was alive from the ground to 16 ft. above ground, that from that point it was entirely dead, and that the condition of the tree was substantially the same at the time that the plaintiff took the lease of the Hackwood Farm as it was at the date of the unfortunate accident to Robinson. If negligence would make the defendants liable, I cannot say, in my opinion, that the learned judge was wrong in finding that the defendants were not negligent. I have already stated most of the facts on this question, but I also desire to call attention to the evidence of Mr. Daniel, the agent, as to his inspection of the trees which adjoined the plaintiff's farm, which was made I think in either February or March, soon after the defendants took possession. The evidence given by him on pp. 12 and 16 of the transcript of the second day's evidence proves that he did in fact go round the boundary between the Park and the plaintiff's farm, that he must have seen all the trees, but that he could not say that he particularly noticed tree 16. He was not a forestry expert, and he either had called or was about to call in a firm of tree fellers, Messrs. Whites, who were better able than he was to decide which trees ought to be immediately dealt with. Messrs. White's men appear to have felled trees which were overhanging some one or other of the roadways which ran through or round the estate, and when Mr. Mould was called in there were on the estate many hundreds of trees that were, to use

(1) 15 C. B. (N. S.) 221. (2) [1906] A. C. 428.

C. A.
1938

Shirvell
v.
Hackwood
Estates
Co.

Greer L.J.

Mr. Mould's words, "dangerous to passers-by." There were footways or cartways through the Park which had to be used by workmen engaged in work on the estate, and there were also many trees adjoining the plaintiff's farm which would require to be dealt with. What more could the defendants be expected to do in the exercise of reasonable care than to take the advice of a forestry expert as to the best method of dealing with the dangerous trees, and then leave it to the expert to see that his advice was carried out? This is what the defendants through Lord Camrose did, and for my part I see no reason to differ from the learned judge in his decision that it was not established to his satisfaction that the death of the deceased man Robinson was occasioned by any negligence on the part of the defendants or Lord Camrose acting on their behalf. It was, of course, impossible for any one to attend to all the trees at the same moment. The work had to be done according to some plan, and if the plan evolved by the expert was not the best in the circumstances, the defendants are not responsible for his failure to advise them to deal immediately with the trees which adjoined the plaintiff's farm. For these reasons I think this appeal must be dismissed.

MacKinnon L.J. The claim of the nominal plaintiff against the defendants must be based upon an allegation that the defendants were negligent in not having cut down, or otherwise rendered innocuous, the tree from which a branch unhappily fell and killed the man Robinson. [His lordship examined the evidence as to the facts, and, upon his view of them, came to the conclusion that the plaintiff had not established that the accident was due to the negligence of the defendants, and continued:]

This was a lamentable accident. But in all the circumstances I think the learned judge was not only justified in coming to the conclusion that the plaintiff did not establish that the accident was due to the negligence of defendants, i.e. to their failure to take reasonable care, but he was right in doing so.

This appeal therefore fails on the facts. And that being so I do not think it is necessary to consider the question of law raised by Mr. Hallett, or to decide whether, assuming that the defendants were negligent, the plaintiff could recover having regard to his relation to the defendants as their tenant. On that I express no opinion, one way or the other.

MacKinnon L.J.

BENNETT J. I agree that this appeal should be dismissed: but since I base my judgment exclusively on the application to the facts of the law relating to the rights and liabilities towards one another of occupiers of adjoining parcels of land between whom there exists the relationship of landlord and tenant, I desire to state the case as it presents itself to my mind.

The plaintiff was, on May 30, 1936, the occupier of Hackwood Farm, Basingstoke. He was in occupation under a tenancy agreement made on January 20, 1936, between the Bolton Estates Company, Ld., as landlords and himself as tenant. There was included in the land let to the plaintiff a close known as Park Piece. Park Piece was bounded on the west by a wood known as the Pelican. This wood was on January 20, 1936, owned by the Bolton Estates Company, Ld. On this date there was a beech tree growing in the Pelican. And growing from this beech was a branch attached to the trunk at the height of about 40 ft. from the ground. This branch extended over Park Piece. On January 20, 1936, the beech was a dying tree and was then dead upwards from a height of about 20 ft. from the ground. The overhanging branch was then in a dangerous state and liable to fall at any moment.

The defendants are an unlimited company incorporated under the Companies Acts. They purchased from the Bolton Estates Company, Ld., Hackwood Park and the Pelican Wood and the reversion expectant upon the determination of the plaintiff's tenancy to Hackwood Farm. They entered into possession of Hackwood Park and the Pelican on February 10, 1936.

On May 30, 1936, one Robinson, a farm labourer employed by the plaintiff, was at work in Park Piece near the Pelican when the branch of the beech tree I have mentioned broke away from the trunk without warning, struck Robinson and killed him.

Robinson's widow claimed compensation from the plaintiff under the Workmen's Compensation Acts. The plaintiff admitted his liability and on August 10, 1936, he paid into Court for the widow the sum of 273*l.* He brings this action against the defendants on the footing that by virtue of the provisions of s. 30 of the Workmen's Compensation Act, 1925, they are liable to indemnify him in respect of this payment.

The defendants did not plead, nor did they argue, that the provisions of the section were not available to the plaintiff, and therefore I assume that the plaintiff can recover if he can prove that Robinson was killed under circumstances creating a liability in the defendants.

The learned trial judge decided the case in favour of the defendants because—to quote his own words—"the only "effective cause of action which really could be called in aid "by the plaintiffs was the cause of action for negligence "which was the one cause of action the plaintiff had in right "of the deceased man and that on the evidence that action "fails because there is no substantive proof of negligence on "the part of the defendants." With all respect to the learned judge, I find myself unable to agree with this conclusion.

If on May 30, 1936, the plaintiff had been the owner of Park Piece and the defendants had been the owners of the Pelican I should have decided in favour of the plaintiff on the ground that the defendants had failed to take reasonable care to see that a branch of a tree growing on their land was not in a dangerous condition.

It was clearly proved that when the defendants went into occupation of the Pelican on February 10, 1936, the fatal branch was overhanging Park Piece and was dangerous. Three and a half months later it fell and killed Robinson. Proof of these facts by the plaintiff in my judgment cast upon the defendants the burden of proving affirmatively that they had taken reasonable care to see that it was not dangerous.

The defendants are a corporation and the proof must therefore be that their agents had used reasonable care. They called two witnesses, Mr. Daniel and Mr. Mould. Mr. Daniel was the agent of the defendants and had the management of the Hackwood Park Estate on behalf of the defendants. Mr. Mould was a forestry expert who had been consulted by the defendants in 1936 for purposes to which I shall presently have to refer.

It was plain from the evidence of those witnesses that when the defendants went into occupation of the Hackwood Park Estate in February, 1936, the timber standing thereon had been much neglected by the defendants' predecessors in title. The estate was an extensive one with a considerable quantity of timber on it. Many standing trees in the Park and woods were dead, many had passed their maturity and blown trees were lying everywhere. If the defendants had really exercised reasonable care to do their duty by their neighbours nothing would have been easier than to prove it. Mr. Daniel could have told the Court what steps he took and what orders he gave to deal with dangerous trees overhanging either highways or the property of neighbouring landowners, and the Court would then have been in a position to judge whether the steps he had taken were reasonable in the circumstances.

Mr. Mould could have told the Court what instructions he had received before he made his report and from whom he had received them, and then again with this information before it the Court would have been able to form a judgment upon the reasonableness or otherwise of the defendants' conduct. The only really relevant question put to Mr. Daniel in his examination-in-chief was a leading one couched in the following terms: "Did you take any steps "with regard to felling trees or seeing that such trees as "were dangerous were felled or anything of that sort." To which ambiguous question the witness replied: "Yes, I "consulted a local timber merchant, Mr. White, of Basing-"stoke." The witness, who did not state what the purposes were for which he consulted Mr. White, then proceeded to speak about the neglect of the trees by the previous owners and the

C. A.
1938

SHIRVELL
v.
HACKWOOD
ESTATES
Co.

Bennett J.

acreage of the woodland, and was then asked what arrangements he had made with Mr. White, to which question he replied: "I got him first of all to come up there and have "a look round with me and ultimately arranged with him "that he would lend me for such period as he could two of "his expert tree fellers." These men started work in the Park on March 9 and worked from then up to April 25, working all the time in the same area. They then left, because White could spare them no longer, and started again on May 25 and worked until after the fatal accident.

In cross-examination Mr. Daniel admitted that the boundaries of the Park could have been perambulated and the trees growing there examined in a week, and he was asked: "You realized by the end of April that on this estate there "were a large number of dead trees? (A.) Yes. (Q.) There was "nothing to prevent the Estate from sending men around "the boundaries in order to detect the dead trees, was there? "(A.) Nothing to prevent them. (Q.) There was nothing "to prevent the Estate from warning the occupiers of adjoining "lands of those dead trees? (A.) Nothing to prevent them."

I regard Mr. Daniel's evidence as failing to prove that the defendants acted reasonably in regard to overhanging trees. It leaves my mind quite uninformed as to the purpose for which Mr. Daniel consulted Mr. White, the advice (if any) he got from him, the purposes for which the two tree fellers were employed, or any other relevant matter. It entirely fails to prove that the defendants recognized the existence of any duty towards their neighbours, or that the defendants took any steps to discharge it. It does show that there were steps which the defendants might easily have taken had they been so minded and that they never took them.

Mr. Mould's evidence on the only question that matters is even more useless than that of Mr. Daniel. He said he was introduced to the defendants at the end of February, 1936. He did not name the person to whom he was introduced. He never said from whom he got his instructions or what they were. I have a shrewd suspicion gathered from a perusal of his first report that when he wrote it (and it is not addressed to anybody) he did not regard himself as advising the defendants: for the report, which was made on April 18, deals, amongst other things, with the deduction from surtax returns, of the costs of clearing, draining, fencing, planting, etc., and with deductions which can be made upon a valuation for death duties. The defendants being a company are, of course, not burdened with either of these duties. However that may be, it is quite obvious from the opening paragraph of the report that Mr. Mould had examined the timber on the Hackwood Park Estate in order to ascertain the possibilities of its improvement and development from an amenity, a shooting, and a timber producing aspect. He was obviously not instructed to see that trees dangerous to the defendants' neighbours were made safe.

Mr. Mould was asked in-chief this question: "No doubt "you observed that he (Mr. Henderson) was suggesting to "Mr. Daniel that safety was not being given a proper part "in the matters which you were considering. Will you tell "my Lord what you say about that?" (A.) "I was trying in "my suggestions in my report both the preliminary and "secondary reports to view the thing as a whole. It was a "big proposition in my way of thinking and I tried to co-"ordinate the amenities and even the shooting and the timber "production with the economic utilization and disposal of the "many dead trees which there were on the estate. I consider "that I stressed in various places in both reports the necessity "of dealing with the dangerous trees. The great difficulty "was that there were so many it was difficult to know where "to start"—a long answer to a simple question if the witness really had had regard to trees dangerous to the defendants' neighbours. His reports speak for themselves. His second was not made until June. The first contains not a single reference to dangerous trees, and not a word as to dealing with any such trees, nor any indication of his having had any regard to the defendants' duties to their neighbours.

The witness, in cross-examination, did say that Lord Camrose, who is said to be the biggest shareholder in the defendant company, said more than once that he was interested in the necessity of making the Park as safe as possible, and the whole estate as safe as possible, from a tree point of view. But the witness did not state when Lord Camrose expressed his interest in this vital matter, whether it was before or after Robinson had been killed, nor did he state whether he got from Lord Camrose any instructions as to how or where dangerous trees were to be dealt with.

Holding as I do that the facts proved by the plaintiff had shifted the burden of proof from his shoulders on to those of the defendants I should have decided that if the defendants had been under a duty to the plaintiff to see that any tree growing on their land and overhanging his was not in a dangerous condition they had wholly failed to discharge it. I believe the truth to be that they never realized that they were under any duty to their neighbours and so never at any time considered how to deal with dangerous trees growing along their boundaries.

But, unfortunately for the plaintiff, he was not at any time owner of Park Piece. He was a mere tenant under a tenancy agreement made between himself and the defendants' predecessors in title at a date when the fatal branch was in a dangerous state and was overhanging Park Piece. It is settled by *Cheater* v. *Cater* (1) that the plaintiff himself could have had no cause of action in respect of injuries caused by the fall on to Park Piece of the fatal branch, and by *Robbins* v. *Jones* (2) and the high authority of Lord Macnaghten in *Cavalier* v. *Pope* (3) that his servant Robinson had no better case than his master. On this ground the plaintiff's action was in my judgment foredoomed to failure. On this ground in my judgment the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellant: *C. W. Stanley Eastburn.*
Solicitors for respondents: *L. Bingham & Co.*

(1) [1918] 1 K. B. 247.
(2) 15 C. B. (N. S.) 221.
(3) [1906] A. C. 428, 430.

J. R.

PETROS M. NOMIKOS, LIMITED *v.* ROBERTSON.

C. A.

1938

May 5, 6, 10, 23.

Insurance (*Marine*)—*Insurance on hull—Insurance on freight—" In the " event of constructive total loss of steamer "—Incorporation of Institute Time Clauses, Freight—Vessel damaged by fire—Cost of repairs more than insured value—Vessel when repaired worth more than cost of repairs—Charterparty not performed—Freight not received—No abandonment to hull underwriters—Claim against hull underwriters for partial loss—Claim against freight underwriters for constructive total loss—Whether maintainable—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60, *sub-ss.* 1, 2; *s.* 61.

The plaintiffs, who were the owners of a steamer, were by various policies dated August 28, 1936, insured in respect of the hull and machinery of the steamer valued at 28,000*l.* for twelve months from July 20, 1936. By a Lloyd's policy also dated August 28, 1936, the plaintiffs were insured in respect of the steamer in the sum of 4110*l.* on freight chartered or otherwise for twelve months from July 20, 1936. The freight policy was subject to the Institute Time Clauses—Freight, which provided in clause 5 as follows: " In the event of the total loss, whether " absolute or constructive, of the steamer, the amount under- " written by this policy shall be paid in full, whether the steamer " be fully or only partly loaded or in ballast, chartered or un- " chartered." The plaintiffs chartered the steamer to carry a cargo of oil from Venezuela to the United Kingdom at a certain freight. The steamer went to a port for repairs, and while there was on October 31, 1936, badly damaged by an explosion followed by fire. The repairs were estimated to cost 37,400*l.*, but as the steamer when repaired would be worth 45,000*l.* the plaintiffs did not abandon the steamer to the hull underwriters but repaired her at the estimated cost, and claimed as for a partial loss from the hull underwriters and were paid by them 27,000*l.* The charterparty was not performed and the plaintiffs did not receive the freight payable thereunder. The plaintiffs claimed 4110*l.* from the underwriters of the freight policy under clause 5 of the Institute Time Clauses attached to the freight policy, but the underwriters refused to pay and the plaintiffs brought an action to recover that amount:—

Held, by the Court of Appeal, reversing the decision of Goddard J., that the plaintiffs were entitled to recover the amount insured by the freight policy from the freight underwriters, as there had been a constructive total loss of the steamer, inasmuch as the steamer had been so damaged by insured perils that the plaintiffs would be entitled on giving notice of abandonment to recover as for a constructive total loss from the hull underwriters; and that it was not necessary that the plaintiffs should have actually given a notice of abandonment and have recovered as for a constructive total loss from the hull underwriters.

Roura & Forgas v. *Townend* [1919] 1 K. B. 189 applied and followed.

C. A.
1938

Petros M. Nomikos, Ld. v. Robertson.

Appeal from a decision of Goddard J. in an action tried in the Commercial Court.

The action was brought by the owners of the steamship *Petrakis Nomikos* against the underwriters of a freight policy to recover for the loss of freight due under that policy.

The action was tried upon an agreed statement of facts which was as follows:—

1. By policies of marine insurance dated August 28, 1936, subscribed by various Lloyd's underwriters and London Insurance Companies, the plaintiffs in consideration of the premium therein set out were insured in respect of the *Petrakis Nomikos* on hull, machinery, etc., valued at 28,000*l.*, for and during the space of twelve calendar months, from July 20, 1936, as employment might offer. The said policies further provided that, in the event of the total or constructive total loss of the vessel, the policies were only to pay their proportion of 14,000*l.*, and that for valuation and disbursements clause purposes the insured value of the vessel was to be taken as 28,000*l.*, so that the value for constructive total loss purposes was 28,000*l.*

In respect of particular average, the policies stipulated for a deductible franchise of 1000*l.*

2. By a Lloyd's policy dated August 28, 1936, subscribed by the defendant and others, the plaintiffs, in consideration of the premium therein set out, were insured in respect of the *Petrakis Nomikos* in the sum of 4110*l.* on "freight, chartered or otherwise, in and/or over" for and during the space of twelve calendar months from July 20, 1936, as employment might offer. The said policy was subject to the Institute Time Clauses—Freight, which provided (inter alia) as follows:—

> "5. In the event of the total loss, whether absolute or constructive of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered."
>
> "6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the

"damaged or breakup value of the vessel or wreck shall "be taken into account."

"8. Warranted free from any claim consequent on loss "of time whether arising from a peril of the sea or "otherwise."

Of the said sum of 4110*l.* the defendant subscribed for 18*l.* 5*s.* 4½*d.*

At all material times the plaintiffs, as owners of the vessel, were fully insured in the said policy.

3. By a charterparty dated September 23, 1936, the plaintiffs chartered the *Petrakis Nomikos* to carry a full cargo of crude oil (about 10,000 tons) for a voyage from Venezuela, Aruba or Curacao to the United Kingdom or Continent at a freight of 7/9 or 8/3; lay days were not to begin before October 25, and the cancelling date was November 10.

4. Having completed the discharge of a cargo of fuel oil the *Petrakis Nomikos*, on October 18, 1936, left Havre in ballast for Rotterdam for various repairs to her furnaces and tubes before proceeding to her port of loading under the charterparty. While she was undergoing those repairs, on October 31, 1936, a violent explosion occurred, followed by a fire. As a result the after part of the steamer and the cross bunker were completely burnt out.

5. The plaintiffs obtained tenders for repairing the steamer and the lowest tender was 37,400*l.* The plaintiffs estimated that owing to the increase in tonnage values the steamer when repaired would be worth about 45,000*l.*, and they accordingly decided on December 18, 1936, to accept the tender and not abandon to their hull underwriters. The plaintiffs thereupon claimed as for a partial loss from their underwriters on the hull and machinery policies, who paid 27,000*l.* (28,000*l.* less the 1000*l.* franchise). The repairs were completed on May 31, 1937, and the steamer had thereafter been used as a freight earning instrument by her owners.

6. It was agreed that the steamer could not have been repaired for less than 37,400*l.*, and that her value when repaired would be about 45,000*l.* The charterparty was

never performed and the plaintiffs had not received any part of the freight payable thereunder.

7. The plaintiffs about February 26, 1937, claimed 4110*l.* under clause 5 of the Institute Time Clauses of the freight policy from their insurers, including the defendant, but their insurers refused to pay the claim.

The question for decision by the Court was whether in the circumstances set out in the agreed Statement of Facts the plaintiffs were entitled to recover 18*l.* 5*s.* 4½*d.*, being the defendant's proportion of the 4110*l.* insured under the freight policy.

Plaintiffs' Contentions.

(1.) That though in certain circumstances the giving of notice of abandonment was a condition precedent to recovery under a hull policy, on the ground of constructive total loss, such notice was not an integral element of a constructive total loss.

(2.) That the fact that the plaintiffs did not give notice of abandonment to their insurers, under their hull policies, but treated the loss thereunder as a partial loss, was irrelevant in considering whether the plaintiffs were entitled to recover under clause 5 of the Institute Times Clauses in the freight policy.

(3.) That the *Petrakis Nomikos* was a constructive total loss under the hull policies.

(4.) That the *Petrakis Nomikos* was a constructive total loss within the meaning of those words in clauses 5 and 6 of the Institute Time Clauses in the freight policy.

(5.) That in the circumstances set out in the agreed Statement of Facts it was unnecessary for the plaintiffs to give notice of abandonment to their insurers under the freight policy in order for them to be able to recover in full thereon.

(6.) That there was no possibility of benefit to the insurers under the freight policy had the plaintiffs given them notice of abandonment of the chartered freight.

(7.) That the said chartered freight was insured under the freight policy and was never earned.

(8.) That in the premises the insurers under the freight policy were liable under clause 5 of the Institute Time Clauses —Freight to pay the plaintiffs the amount underwritten by the policy in full, to wit 4110*l.*

DEFENDANT'S CONTENTIONS.

(1.) That there could be no constructive total loss upon hull policies unless timely notice of abandonment was given.

(2.) That there could only be a constructive total loss where the subject-matter insured was " reasonably abandoned " on account of the matters set out in s. 60, sub-ss. 1 and 2, of the Marine Insurance Act, 1906. That " reasonable "abandonment " was an essential preliminary to the establishment of a constructive total loss in relation to any of the states of affairs mentioned in that section.

(3.) That the term " constructive total loss " applied only to matters of marine insurance and that there could not be a constructive total loss unless the requirements of the Marine Insurance Act to constitute such a loss were complied with. In this case the assured did not in fact claim as for a constructive total loss under their hull policies. Having made their election they could not now say that there was a constructive total loss of the steamer.

(4.) That alternatively, and in any event, it was necessary for the assured, in order to recover on freight policies on a constructive total loss basis, to give notice of abandonment to freight underwriters, and that the assured had failed so to do.

(5.) That there was a custom whereby no claim was made or met on freight policies in the present form under clause 5 of the Institute Time Clauses unless the assured had tendered notice of abandonment under the hull policies and had claimed, and been paid, a constructive total loss on hull policies, or unless there had been an absolute total loss of the steamer.

(6.) That the vessel remained at the present time the property of the assured: she had been repaired and was being used as a freight-earning instrument for her owners: she was not an absolute or constructive total loss, and therefore no claim under clause 5 of the Institute Time Clauses based on absolute or constructive total loss could arise.

C. A.
1938

Petros M. Nomikos, Ld. v. Robertson.

(7.) That it had not been customary in the past to claim under clause 5 of the Institute Time Clauses—Freight, in circumstances where owners had not tendered notice of abandonment under the hull policy, but had elected to treat the loss as a partial loss, and to claim 100 per cent. particular average under the hull policies.

(8.) That having regard to the terms of clause 8 the assured could not recover under clause 5 unless the actual or constructive total loss of the vessel had resulted in a loss of freight.

Goddard J. This action, which is brought against the underwriters of a freight policy, is tried upon an agreed statement of facts which it is unnecessary to set out in detail. The policy was in respect of the steamship *Petrakis Nomikos*, in the sum of 4110*l.* on freight chartered or unchartered and was subject to the Institute Time Clauses—Freight. The plaintiffs based their claim entirely on clause 5 of those clauses, which reads: "In the event of total loss, whether absolute or "constructive, of the steamer, the amount underwritten by "this policy shall be paid in full whether the steamer be fully "or only partly loaded or in ballast, chartered or unchartered."

The steamer was the subject of a hull insurance policy under which it was provided that, although for valuation clause purposes the insured value was to be taken as 28,000*l.*, underwriters were in the event of total or constructive total loss only to pay 14,000*l.* There was a warranty that 50 per cent. of the valuation was uninsured for total or constructive total loss. Then clause 6 of the Institute Clauses in the freight policy provided that "In ascertaining whether the vessel is "a constructive total loss the insured value in the policies "on ship shall be taken as the repaired value, and nothing in "respect of the damaged or break-up value of the vessel or "wreck shall be taken into account."

The ship had been chartered to carry a cargo of oil, the freight for which would have been something quite near to the amount for which it was insured, but while the ship was being prepared for the voyage there was an explosion and fire on board which caused very considerable damage. The repairs cost 37,400*l.* which was more than the insured value. It would have been open to the plaintiffs, who were the owners of the vessel, to have treated her as a constructive total loss, but in fact they elected to claim for a partial loss, and so were paid the insured value of 28,000*l.* less a franchise of 1000*l.*, and repaired the ship themselves. The reason for this was, no doubt, that owing to the rise in freights they considered that the value of the ship had risen considerably, and in this they were right, as the ship when repaired was worth no less than 45,000*l.* The ship has been retained by them and is still in their service as a cargo carrier.

Mr. Willink contends that for the purpose of the freight policy, the ship is a constructive total loss. He says that once it is admitted that the repairs cost more than the insured value there must be a constructive total loss in the words of s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, and that for the purpose of the freight policy it matters not that as between owners and hull underwriters there has been an election to treat the loss as partial. He further contends that no notice of abandonment was necessary as no possible benefit could have accrued to the underwriters.

Sir Robert Aske's contentions on behalf of the underwriters may, I think, be summarized as follows: first, although the clause on which the claim is based in terms provides for the payment of a fixed sum on the happening of a certain event, it is none the less an insurance and it must therefore be proved that the loss of freight was caused by the ship becoming a constructive total loss. He says that there is only one case in which freight is lost by this cause, and that is where a ship earns freight after abandonment to the hull underwriters, and the latter are consequently entitled to keep it; in other words, when the freight is earned and paid, but not to the shipowners. Secondly, he says that there has not been a constructive total loss here, as the ship was never abandoned to the underwriters.

In my opinion the defendants are right on both those points.

On the first point, indeed, I think, I am bound by authority.

C. A.
1938

Petros M. Nomikos, Ld. v. Robertson.

Goddard J.

In *Carras* v. *London and Scottish Assurance Corporation* (1), no doubt the decision was that the assured was entitled to recover under a freight policy at common law and that the clause, which in the present case is clause 6, had no application; but none the less the effect of clauses 5 and 6 was fully discussed both by the Master of the Rolls and by Greene L.J., and I cannot regard what was said about them in the judgment as merely obiter, nor if it was, should I disregard it. In my opinion, the judgment of Lord Wright, M.R. (2) shows that he views the effect of clause 5 (in the *Carras* case (1) it was clause 4) exactly in the way for which Sir Robert Aske contends. Even if the clause has some wider effect, as is suggested, though not decided by Greene L.J., it seems to me that, in the opinion of the Court of Appeal, the object of the clause is to provide that the sum assured should be paid to the assured in a case where the freight was actually earned but became payable to the underwriters of the hull.

If I am wrong on this point, it seems to me that it is impossible to hold that in the present circumstances there has been a constructive total loss of the ship. Mr. Willink submits that, for the purpose of clause 5, he has no concern with what may be the position between the shipowner and the hull underwriters. With that I cannot agree. The conception of a constructive total loss can only arise in connection with a marine insurance policy. Clause 5 expressly refers to the constructive total loss of the steamer. Therefore, it seems to me that one must inquire if there has been a constructive total loss under the hull policy. I cannot see how there can be a constructive total loss unless there has been abandonment. The very conception predicates, in my opinion, that there has been a loss of the vessel to the assured, not actual, but in the business sense. How can it be said that the assured has in any sense lost his vessel if he not only keeps it, but repairs it and continues to use it? Moreover, the words of s. 60 appear to negative in express terms the idea of a constructive total loss occurring without abandonment. The words are: "where the subject-matter insured is reasonably abandoned

---

(1) [1936] 1 K. B. 291.

(2) Ibid. 306, 307.

"on account of its actual total loss appearing to be unavoidable, "or because it could not be preserved from actual total loss "without an expenditure which would exceed its value when "the expenditure had been incurred." Sub-s. 2 goes only, I think, to particular instances, but in any case the ship must be reasonably abandoned and in my opinion it is the abandonment that constitutes the total loss to the owner.

When properly understood the case of *Roura & Forgas* v. *Townend* (1), upon which Mr. Willink so strongly relied, does not in my judgment in any way conflict with that view. In that case there was, in the words of Lord Wright, a notional constructive loss of ship under a notional hull policy. The case was decided, I think, on the footing that, had there been a hull policy in existence, it is only reasonable to suppose that the owners would have abandoned.

In the present case it may well be that under the doctrine of *Rankin* v. *Potter* (2), it would have been unnecessary to give notice of abandonment. Abandonment and notice of abandonment are two things quite distinct, and as in my opinion the facts here emphatically negative an abandonment, it follows that there has been no constructive total loss. There will therefore be judgment for the defendants with costs.

The plaintiffs appealed. The appeal was heard on May 5, 6 and 10, 1938.

H. U. Willink K.C. and *Mocatta* for the appellants. The decision of Goddard J. was wrong. Under clause 5 of the Institute Time Clauses—Freight, which are attached to this policy, it is only necessary for the assured to prove that the event has happened in order to prove a constructive total loss. "Constructive total loss" is defined in s. 60 of the Marine Insurance Act, 1906, as follows: sub-s. 1: "Subject to "any express provision in the policy, there is a constructive "total loss where the subject matter insured is reasonably "abandoned on account of its actual total loss appearing to "be unavoidable, or because it could not be preserved from "actual total loss without an expenditure which would exceed "its value when the expenditure had been incurred."

(1) [1919] 1 K. B. 189.

(2) (1873) L. R. 6 H. L. 83.

Sub-s. 2: "In particular there is a constructive total loss—"(i.) where the assured is deprived of the possession of his "ships or goods by a peril insured against, and (*a*) it is unlikely "that he can recover the ship or goods, as the case may be, or "(*b*) the cost of recovering the ship or goods, as the case may "be, would exceed their value when recovered; or (ii.) In "the case of damage to a ship, where she is so damaged by a "peril insured against that the cost of repairing the damage "would exceed the value of the ship when repaired. . . ." Sect. 61 provides that "where there is a constructive total "loss the assured may either treat the loss as a partial loss, or "abandon the subject-matter insured to the insurer and "treat the loss as if it were an actual total loss." Once it is admitted that the repairs cost more than the insured value there must be a constructive total loss. It is immaterial for the purpose of the freight policy that as between the shipowners and the hull underwriters there has been an election to treat the loss as a partial loss. Whether there is a constructive total loss of a ship depends upon the condition of the ship and not upon the assured's treatment of it. In *Kaltenbach* v. *Mackenzie* (1), constructive total loss was considered to depend not on abandonment but on the condition of the ship. It was held by Roche J. in *Roura & Forgas* v. *Townend* (2) that the giving of a notice of abandonment was not an essential element of a constructive total loss. In that case there had been neither abandonment in fact, nor had any notice of abandonment been given, and yet it was held that there had been a constructive total loss of the vessel. That case decides in a perfectly general manner what constitutes constructive total loss. That decision is right and governs the present case. This case is analogous to *Wallis, Son & Wells* v. *Pratt & Haynes* (3), where the plaintiffs were held entitled to the remedies applicable to a breach of warranty on a sale of goods.

The alternative view that clause 5 of the Institute Time Clauses—Freight, was devised solely for the purpose of meeting

---

(1) (1878) 3 C. P. D. 467.
(2) [1919] 1 K. B. 189.
(3) [1911] A. C. 394.

C. A.
1938

PETROS M. NOMIKOS, LD. v. ROBERTSON.

the decision of the House of Lords in *Scottish Marine Insurance Co. of Glasgow* v. *James Turner* (1), is not a tenable one. One objection to that view is that the clause deals with the case in which the ship is not earning freight, as for example, where she is in ballast, or unchartered; another objection is that the mischief cannot arise and there can be no claim for freight under the Institute Time Clauses. If the charterparty had been discharged by perils of the sea there would be a loss of chartered freight. The parties have agreed that on the constructive loss of the ship the sum insured on freight should be paid in full. The effect of clause 8 of the Institute Time Clauses—Freight, is that if a shipowner wishes to show that he has lost freight through perils of the sea, he must rely on perils of the sea only and cannot recover by reference to time lost. There is nothing in the present case to show that the parties based their agreement to cancel the charterparty upon loss of time. It is not necessary for the shipowners in this case to rely upon time lost, their claim is based upon the fact that there has been a constructive total loss of the ship. The decision in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2) turned upon the special facts of that case and is distinguishable. The origin of the trouble was the decision of the House of Lords in *Scottish Marine Insurance Co. of Glasgow* v. *James Turner* (1), where the House approved and followed a decision of Lord Ellenborough C.J. in *M'Carthy* v. *Abel.* (3) In that case there had been an abandonment of ship and freight to the respective underwriters on ship and freight. Subsequently the ship performed her voyage and earned freight which was received by the underwriters on ship. In an action by the assured against the underwriters on freight it was held by Lord Ellenborough that there had either been no loss of freight, or if there had been a loss it was a loss occasioned only by the act of the assured in abandoning the ship, and was not a loss by perils insured against and that therefore the assured were not entitled to recover. In *United Kingdom*

---

(1) (1853) 1 Macq. (H. L.) 334.
(2) [1897] A. C. 609.
(3) (1804) 5 East, 388.

Mutual Steamship Assurance Association v. *Boulton* (1), plaintiffs who had paid for a total loss of freight on a policy on freight were held entitled to recover on a reinsurance policy, where the reinsurers were only to pay in the event of total or constructive total loss. The ship became a constructive total loss and notice of abandonment was given.

[MacKinnon L.J. The decision in that case turned upon the construction of a rule of a freight club. You cannot get any general principle out of it.]

It was held in *Coker* v. *Bolton* (2), that the words " in full " in clause 5 of the Institute Time Clauses—Freight, did not mean "without benefit of salvage." It was held in *Carras* v. *London and Scottish Assurance Corporation* (3), that the test whether freight underwriters would be liable for a constructive total loss would be analogous to that applicable in determining whether there had been a constructive total loss of ship. That case dealt with an entirely different claim to that made in the present case. *Kulukundis* v. *Norwich Union Fire Insurance Society* (4) has no bearing upon the claim in this case.

Sir Robert Aske K.C. and *W. L. McNair* for the respondent. The decision of Goddard J. was correct. The shipowners in this case decided not to abandon the ship, but to treat it as a partial loss; there cannot therefore be a constructive total loss of the ship. The shipowners in this case entered into two policies of insurance at the same time, one on hull and the other on freight, and they say that so far as the hull policy is concerned there was only a partial loss, but so far as the policy on freight is concerned the ship was a constructive total loss. The shipowners are not entitled at the same time and with regard to the same event to treat the ship as a constructive total loss under one policy and only a partial loss under the other. The two policies are connected with each other. Under the definition of constructive total loss in s. 60, sub-s. 1, of the Marine Insurance Act, 1906, there must be an abandonment of the subject-matter insured on

(1) (1898) 3 Com. Cas. 330.
(2) [1912] 3 K. B. 315.
(3) [1936] 1 K. B. 291.
(4) [1937] 1 K. B. 1.

C. A.
1938

PETROS M. NOMIKOS, LD.
v.
ROBERTSON.

account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. It is stated in Halsbury's Laws of England, 2nd ed., vol. 18, p. 365, that s. 60, sub-s. 1, of the Act sets forth generally the grounds on which a constructive total loss may be founded, whereas s. 60, sub-s. 2, of the Act states certain particular instances or illustrations.

[MACKINNON L.J. referred to the article on Marine Insurance in the 1st ed. of Halsbury's Laws of England, vol. 17, which was written by Mr. Arthur Cohen K.C.]

Abandonment of the subject-matter insured is an essential ingredient of a constructive total loss. There is a great distinction between abandonment and notice of abandonment. Under s. 60, there must be abandonment in order that there should be a constructive total loss, but before the assured can recover there must, under s. 62, also be a notice of abandonment. Bigham J. stated in *Western Assurance Co. of Toronto* v. *Poole* (1) that "the notice of abandonment is a necessary "preliminary to a claim for a constructive total loss." It is stated in Arnould on Marine Insurance, 11th ed., s. 1091, that "a constructive total loss in Insurance Law is that "which entitles the assured to claim the whole amount of the "insurance, on giving due notice of abandonment." If a shipowner repairs his ship and uses it again in his business, as was done in the present case, there cannot be a constructive total loss of the ship. Whether or not a ship becomes a constructive total loss depends on the manner in which the owner elects to treat her. In *Woodside* v. *Globe Marine Insurance Co.* (2) the plaintiffs' vessel was insured by the defendants by a valued time policy against loss or damage by fire. While so insured, she stranded and sustained such injuries that the cost of repairing her would be greater than her value when repaired. Shortly afterwards, she was completely destroyed by fire. It was held that the defendants were liable for the full amount for which they had insured the vessel. Mathew J.

(1) [1903] 1 K. B. 376, 383.

(2) [1896] 1 Q. B. 105.

there said that the loss by stranding would only become total if the assured gave timely notice of abandonment. It was laid down by Lord Ellenborough C.J. in *Tunno* v. *Edwards* (1) that abandonment was essential to a claim for constructive total loss. *Roux* v. *Salvador* (2) is the leading case on the subject of abandonment. It is there stated in the clearest terms by Lord Abinger C.B. that in order that there should be a constructive total loss there must be an abandonment of the subject-matter insured. *Mellish* v. *Andrews* (3) is another decision to the same effect. The House of Lords in *Rankin* v. *Potter* (4) considered the question as to what constituted a constructive total loss of a ship, and held that no notice of abandonment to the underwriters on freight was necessary, but the speech of Lord Chelmsford is a strong authority in support of the respondent's contention. Lord Wrenbury pointed out in *British and Foreign Marine Insurance Co.* v. *Samuel Sanday & Co.* (5) that the Marine Insurance Act, 1906, is a codifying Act, and added : " That being so, I should "look more carefully in a codifying Act to see whether any "existing law is altered by express words, and should not "hold that the Act is going beyond codification unless it puts "the matter beyond dispute." Kennedy L.J. in *Polurrian Steamship Co.* v. *Young* (6) considered the question whether the Marine Insurance Act, 1906, had altered the pre-existing law, and came to the conclusion that it had to the disadvantage of the assured and had substituted in s. 60, sub-ss. 1 and 2, the test of " unlikelihood of recovery " for that of " uncertainty "of recovery." Sect. 60 laid down in sub-s. 1 the general principle according to the earlier decisions, and sub-s. 2 merely gives illustrations of that general principle. Sect. 60 is the only section in the Marine Insurance Act which purports to define the meaning of constructive total loss. Abandonment is an essential element of constructive total loss. The shipowner can either claim as for a partial loss, as was done in this case, or he may elect to abandon the ship to the underwriters.

---

(1) (1810) 12 East, 488, 493.
(2) (1836) 3 Bing. (N. C.) 266.
(3) (1812) 15 East, 13.
(4) L. R. 6 H. L. 83.
(5) [1916] 1 A. C. 650, 673.
(6) [1915] 1 K. B. 922, 936.

Under s. 62, sub-s. 1, if the assured fails to give notice of abandonment, the loss can only be treated as a partial loss. The parties when they made the insurance on freight had also in their contemplation the insurance on hull. There can not be a constructive total loss under the freight policy unless there is also a constructive total loss under the hull policy. In *Roura & Forgas* v. *Townend* (1) there was an insurance on the profit on a charter against total and/or constructive loss. The decision in that case that the plaintiffs were entitled to recover was right on the ground stated by Lord Wright M.R. in *Carras* v. *London and Scottish Assurance Corporation* (2) namely, that the decision in *Roura & Forgas* v. *Townend* (1) was based upon a notional constructive total loss of ship under a notional hull policy. The second finding in the headnote of *Roura & Forgas* v. *Townend* (1) that the giving of a notice of abandonment was not an essential element of a constructive total loss, was not necessary for the decision in that case and is not good law. In *Kaltenbach* v. *Mackenzie* (3) all that was being considered was the necessity for the assured to give notice of abandonment to the underwriter as soon as he received information that the subject-matter of insurance was in imminent danger of becoming a total loss in order to entitle the assured to recover as for a constructive total loss. In that case the ship was sold for account of the underwriters, which constituted abandonment. Brett L.J. there pointed out the distinction between abandonment and notice of abandonment.

[GREER L.J. How can there be an abandonment of the subject-matter of insurance without a notice of abandonment?]

A shipowner abandons the ship, but he is bound to give a notice of abandonment to the underwriters for their protection. Under the clause in the freight policy there is only one case in which loss of freight can result from a ship becoming a constructive total loss, and that is where a ship earns freight after abandonment to the hull underwriters. The loss of freight in this case was due to the time occupied in the repair of the ship and not to the ship becoming a constructive total loss. Loss due to delay is excluded by clause 8 of the Institute Time Clauses—Freight: see *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (1)

---

(1) [1919] 1 K. B. 189.
(2) [1926] 1 K. B. 291, 308.
(3) 3 C. P. D. 467.

H. U. Willink K.C. in reply. Clause 5 of the Institute Time Clauses—Freight, was drafted in the simplest terms to secure to the shipowner payment of the sum insured on the happening of an event. The shipowner desired to be protected against the loss of the freight earning capacity of his ship. The plaintiffs' claim in this case is for the constructive total loss of that freight earning capacity. The loss which the plaintiffs have sustained does not depend upon the action of the assured but upon what happened to the subject-matter of insurance. The cases decided before the passing of the Marine Insurance Act, 1906, are of very little assistance as the judges who decided those cases did not have in their minds what constituted a constructive total loss. The decision of Roche J. in *Roura & Forgas* v. *Townend* (2), is clearly in favour of the plaintiffs' contention in this case. That decision has stood for twenty years and ought not now to be disturbed. The Marine Insurance Act, 1906, supports the plaintiffs' contention. It is stated in Maxwell on the Interpretation of Statutes, 7th ed., p. 217, that the authorities "would seem rather to establish that "the judicial interpreter may deal with careless and inaccurate "words and phrases in the same spirit as a critic deals with "an obscure or corrupt text, when satisfied, on solid grounds, "from the context or history of the enactment, or from the "injustice, inconvenience, or absurdity of the consequences "to which it would lead, that the language thus treated "does not really express the intention and that his amendment "probably does." That statement was approved by Romer L.J. and Maugham L.J. in *Swan* v. *Pure Ice Co.* (3) Mr. Arthur Cohen K.C. dealt with *Woodside* v. *Globe Marine Insurance Co.* (4), in Halsbury's Laws of England, 1st ed., vol. 17, p. 463, where he said that in that case "the rule was applied, though

(1) [1897] A. C. 609.
(2) [1919] 1 K. B. 189.
(3) [1935] 2 K. B. 265, 276, 281.
(4) [1896] 1 Q. B. 105.

"when the peril insured against occurred the ship had already "sustained a constructive total loss."

Cur. adv. vult.

1938. May 23. The following judgments were read :—

GREER L.J. This is an appeal from the decision of Goddard J. as to the meaning and effect of certain clauses contained in a policy of insurance on freight, the contract of insurance being between the plaintiffs and the defendant as one of the underwriters. The plaintiffs besides insuring the freight had insured the hull with a number of Lloyd's underwriters, of which the defendant was one, for twelve months from July 20, 1936, valued at 28,000*l*. The policy provided that in the event of total or constructive total loss of the vessel the underwriters were only to pay their proportion of 14,000*l*., and that for valuation and disbursement clause purposes the insured value of the vessel was to be taken as 28,000*l*.

Under a charterparty dated September 23, 1936, the plaintiffs chartered the vessel *Petrakis Nomikos* to carry a cargo of oil for a voyage from Venezuela or alternative ports in South America to the United Kingdom. The vessel discharged a cargo of fuel oil at Havre and left in ballast for Rotterdam for repairs. An explosion took place while the vessel was being repaired, and a claim came into existence against the underwriters on the hull as well as against the underwriters on freight inasmuch as it became impossible for the vessel to get to the port of loading in time, the adventure thus being frustrated. Though for the purposes of the contract the value of the vessel for constructive total loss was contractually fixed at 28,000*l*., the vessel when repaired was worth at current values at the time of repair 45,000*l*. It was obviously to the advantage of the plaintiffs to have the vessel repaired and not to abandon her to underwriters.

The policy of freight contained the following clauses, which are part of the Institute Time Clauses :—

"5. In the event of the total loss, whether absolute or

C. A.
1938
Petros M. Nomikos, Ld. v. Robertson.
Greer L.J.

"constructive, of the steamer, the amount underwritten "by this policy shall be paid in full, whether the steamer "be fully or only partly loaded or in ballast, chartered "or unchartered."

"6. In ascertaining whether the vessel is a constructive "total loss the insured value in the policies on ship shall "be taken as the repaired value, and nothing in respect of the "damaged or breakup value of the vessel or wreck shall "be taken into account."

"7. In calculating the amount due under this policy in "respect of any claim except under clauses 3 and 5 all "insurances on freight (including honour policies on freight) "shall be taken into consideration, and when the total of "such insurances exceeds in amount the gross freight "actually at risk only a rateable proportion of the gross "freight lost shall be recoverable under this policy, not-"withstanding any valuation therein."

"8. Warranted free from any claim consequent on loss "of time whether arising from a peril of the sea or "otherwise."

It seems to me that the effect of these clauses is to define as between the insurers and the insured what is to be a constructive total loss. If the effect of the clauses would be to give to the plaintiffs an indemnity in respect of freight which they had not in fact lost, it might to that extent be held to be an honour policy to the extent to which it provided more than an indemnity, but the parties have themselves chosen an agreed definition of a constructive total loss, and no point was taken either before the learned judge or in argument in this Court that the policy was unenforceable as being either wholly or in part an honour policy.

Assuming, though without deciding the point, that where there is a real constructive total loss on hull, abandonment to the Insurers and notice of abandonment are required, these conditions can have no operation to a conventional constructive total loss which on the facts of the case is necessarily less than a real constructive total loss. I desire to add, without finally deciding the point, that the inclination

C. A.
1938

PETROS M. NOMIKOS, LD. v. ROBERTSON.

Greer L.J.

of my mind is to hold that abandonment and notice of abandonment are not part of the definition of constructive total loss, but are conditions subsequent which have to be performed before a claim can be made against underwriters. But in my view this question does not arise, and for my part I desire to reserve my decision with regard to it.

For these reasons, having for the purposes of the freight policy defined by reference to the hull policy what is to be regarded between the parties as a constructive total loss, I think the learned judge was wrong in dismissing the plaintiffs' claim, and that this appeal is entitled to succeed on the ground that in this particular instance the parties had agreed upon their own definition as to what was to amount to a constructive total loss, and the appeal succeeds notwithstanding that on the true facts the vessel never was a constructive total loss, and the claim against the hull insurers was expressly a claim for particular average.

The appeal must be allowed with costs here and below. I should like to add that I congratulate the parties on the sensible and businesslike way in which they have raised the question for the determination of the Court.

MACKINNON L.J. The plaintiffs and the defendant entered into a contract in writing dated August 28, 1936. The question that arises is what is the proper construction of that written contract.

The contract happens to be an insurance policy for 4110*l.*, on " Freight, chartered or otherwise, in and/or over " upon the tank steamer *Petrakis Nomikos*. We have had cited to us a great many cases dealing with what is called the law of marine insurance. All those cases (and indeed almost all of the " law of marine insurance ") concern the construction of the terms of written contracts. Except in so far as the contracts, or policies, in those cases are to any extent in the same terms as the contract we have now to construe, they are of little assistance.

The case was heard upon an agreed statement of facts. This will no doubt be set out by anyone who thinks this case is worth reporting, and I need not trouble to write it out.

The plaintiffs make their claim on clause 5 of the "Institute "Time Clauses—Freight," which are attached to the policy and supplement its general terms. They say: "You promised "to pay the amount underwritten by this policy in the event "of the total or of the constructive total loss of the steamer "by insured perils within the insured period. One of those "events—namely, a constructive total loss, has happened. "Therefore you must pay." The defendant answers: "That "event has not happened, therefore I need not pay." The question for us is: "Has that event happened?"

The passage to be construed is really only the eleven words: "In the event of the constructive total loss of the steamer." The plaintiffs say that the proper meaning of these words is: "If the steamer is so damaged by insured perils that her "owners would be entitled on giving notice of abandonment "to recover a total loss from their hull underwriters." The defendants say that the proper meaning is: "If the steamer "is so damaged that the owners would have that right, and "if they exercise that right and do recover for a total loss "from their hull underwriters."

For several reasons I think the former meaning, that put forward by the plaintiffs, is the one to be preferred.

In the first place if by this clause 5 the underwriters meant to promise only that they will pay if underwriters on hull pay, or are liable to pay, for a constructive total loss, it would have been easy to say so. They do not by any words make payment of a total loss by hull underwriters a condition of their promise. The event their words refer to is damage to the ship by insured perils.

Secondly, if the defendant is right the case of *Roura & Forgas* v. *Townend* (1), must have been wrongly decided by Roche J. That was a policy on "profit on charter," which is an interest akin to freight. And it was "against the total "or constructive total loss of the steamer only." The steamer was not a total loss, for she was in existence, and, after romantic experiences, repaired and in good order. The claim was for a loss by reason of the constructive total loss of the steamer. It was argued that there had been no constructive total loss of the steamer because her owners had not given notice of abandonment and recovered for a total loss. As in fact they were uninsured, of course, they had not achieved the impossible. Roche J. held that the plaintiffs could none the less recover. I think still (as I am sure I thought at the time) that his judgment was perfectly correct. And, if it was so, it is fatal to the present defendant's contention.

---

(1) [1919] 1 K. B. 180.

In this case the policy sued on recognizes the existence of a policy or policies on hull. Clause 6 stipulates that in ascertaining whether the constructive total loss referred to in clause 5 has occurred the insured value in the hull policy shall be taken as the repaired value. And at the foot of the body of the policy there is a warranty that 50 per cent. of the valuation in the hull policy is uninsured against total or constructive total loss. Consistently with any obligation of the plaintiffs to the defendant, by warranty or otherwise, the plaintiffs might have taken out their hull policies for 50 per cent. of the insured value but "against the risk of absolute total loss "only." (See s. 902 of Arnould on Marine Insurance.) And as I do not think the warranty as to 50 per cent. being uninsured imports any implied warranty that the other 50 per cent. is insured, they could also, consistently with any obligation to the defendant, have had their hull policy on the terms that it was only to cover particular average, general average and salvage. All this supports me in the view that the promise in clause 5 is not to be construed as meaning: "In the event of your recovering 50 per cent. "of the insured value in your hull policies as for a constructive "total loss."

But the real question is what is the meaning of the seven words "the constructive total loss of the steamer." Sir Robert Aske says they mean "the ship being damaged "to a certain extent and her owners giving notice of "abandonment." And he says "abandonment is an essential "element in the definition of a constructive total loss." He

C. A.
1938

Petros M. Nomikos, Ld. v. Robertson.

MacKinnon L.J.

relies on the passage in sub-s. 1, of s. 60, of the Marine Insurance Act, 1906: "Subject to any express provision in "the policy, there is a constructive total loss where the "subject-matter insured is reasonably abandoned on account "of its actual total loss appearing to be unavoidable, or "because it could not be preserved from actual total loss "without an expenditure which would exceed its value when "the expenditure had been incurred." But that does not help him very much, since sub-s. 2 (ii.) of the same section is in terms on which Mr. Willink could rely with equal vigour: "In the case of damage to a ship, where she is so damaged "by a peril insured against that the cost of repairing the "damage would exceed the value of the ship when repaired. "In estimating the cost of repairs, no deduction is to be "made in respect of general average contributions to those "repairs payable by other interests, but account is to be "taken of the expense of future salvage operations and of any "future general average contributions to which the ship "would be liable if repaired." And s. 61 is still more in favour of the plaintiffs' contention: "Where there is a "constructive total loss the assured may either treat the loss "as a partial loss, or abandon the subject-matter insured "to the insurer and treat the loss as if it were an actual total "loss." I say it is still more in their favour, because if Sir Robert is right in the definition for which he contends, s. 61 must be paraphrased: "If the assured abandons the ship "as not worth repairing, he may either treat the loss as "partial or may abandon the ship." Which is absurd: abandonment appears in both protasis and apodosis.

The truth is that "loss" is a word of double import. It may mean objectively the disaster that has befallen the subject-matter of the insurance; or it may mean, from the underwriter's point of view, the claim that is payable on the policy—that which the underwriter has to enter in his loss book. In the first sense, disaster to the ship, constructive total loss means the ship being so damaged that the cost of repair will exceed her repaired value; in the second sense, claim recoverable, it no doubt means that plus notice of abandonment. I think this clause 5 in speaking of "the event "of the steamer being a constructive total loss" is using the phrase in the first sense, and in the precise words of s. 60, sub-s. 2 (ii.) of the Act: "In the case of damage to a ship, "where she is so damaged . . . . that the cost of repairing "the damage would exceed the value of the ship when repaired." And I think it is wrong, and confusing, to bring in the second sense, so that "in the event of the constructive total loss of "the steamer" is made to mean "in the event of the hull "underwriters being made liable for a constructive total "loss."

It results that in my opinion Goddard J. was wrong in upholding this contention of the defendant.

The learned judge also relies upon another argument of the defendant. He says that for the plaintiffs to recover under clause 5 "it must be proved that the loss of freight was caused "by the ship becoming a constructive total loss"; and "there is only one case in which freight is lost by this cause, "and that is where a ship earns freight after abandonment to "the hull underwriters, and the latter are consequently entitled "to keep it." If I understand this rightly it means that clause 5, when it promises a payment "in the event of the "constructive total loss of the steamer" can only have any effect in one very rare event—namely, if freight earned by the steamer has been received by hull underwriters, who have accepted notice of abandonment of the hull, or have been judicially held liable for a constructive total loss.

I cannot agree with this suggestion. It is absolutely certain that those who drafted these Institute Clauses can never have intended, or even dreamed of, any such meaning. The contemporaneous hull policy on this vessel is in evidence, and that has attached to it Institute Time Clauses—Hulls. No. 18 of these is: "In the event of total or constructive "total loss no claim to be made by the underwriters for freight "whether notice of abandonment has been given or not." If, therefore, clause 5 of the Freight Clauses only means: "To pay a total loss in the event of hull underwriters becoming "entitled to freight upon the steamer being abandoned to

C. A.
1938
Petros M. Nomikos, Ld. v. Robertson.
MacKinnon L.J.

"them," it is promising to pay a loss that under the machinery of the Institute Clauses can never happen, and the underwriter is taking pro tanto a premium for nothing. For No. 18 of the Institute Clauses for Hulls stipulates that such a form of loss never shall happen !

Yet another consideration shows the impossibility of this construction. The right of hull underwriters to whom the ship is abandoned to receive freight arises as an incident of the property in the ship which is transferred to them. Sect. 63, sub-s. 2, of the Marine Insurance Act, 1906, says : "Upon the abandonment of a ship, the insurer thereof is "entitled to any freight in course of being earned, and which "is earned by her subsequent to the casualty causing the loss, "less the expenses of earning it incurred after the casualty ; "and, where the ship is carrying the owner's goods, the "insurer is entitled to a reasonable remuneration for the "carriage of them subsequent to the casualty causing the "loss." But the underwriters do not in any way become parties to the shipowner's contracts of affreightment. So that if the captain tranships the cargo and earns freight by so doing, the underwriters, as abandonees of the ship, have no claim for the freight so earned : *Hickie* v. *Rodocanachi* (1). But this clause 5, which is said only to promise to pay for freight lost through its being earned by hull underwriters, adds that the payment will be made even if the vessel is " in "ballast." It is utterly impossible for underwriters on hull to have any right to freight on accepting abandonment of a vessel " in ballast." So that again in this part the clause must promise nothing, and the premium pro tanto be asked for nothing in return.

It is, of course, possible that the framers of the clause, though they cannot decently have intended the suggested effect of it, may have used inadvertently words that have that meaning. But I do not think they have. I differ from the learned judge for another reason. He says : " It "must be proved that the loss of freight was caused by the "ship becoming a constructive total loss . . . . and there

---

(1) (1859) 4 H. & N. 455.

"is only one case in which freight is lost by this cause." I do not think that, under this clause, it is in the least necessary for the assured to prove "that the loss of freight was caused "by the constructive total loss of the ship." The underwriter has promised if a certain event happens to pay, not any proved loss of freight, but to pay the whole insured sum, and that "whether the ship be fully or only partly loaded, or in "ballast, chartered or unchartered." If the event happens, and the assured proves that it has happened, he need prove nothing more, and subject to the possibility (if business decency permitted it) of a defence of want of insurable interest, the underwriter must implement his promise and pay.

In other words, I think this part of the policy is an example of a very familiar form of insurance. An underwriter, in consideration of a premium, promises to pay a certain sum if a certain event shall happen. The event may be "if you "break your leg" or "if Mrs. —— shall give birth to twins," or "if the Budget adds threepence to the income tax." In this case the event is a double one: "In the event of a total "loss whether absolute or constructive of the steamer." Of those two events one, "the constructive total loss of the "steamer" has, I think, happened, and the underwriter must fulfil his promise and pay.

Lastly, if this had been an insurance of freight against the risk of constructive total loss of the steamer, and it had been necessary to prove that freight had been lost by that cause, I do not agree that the only possible loss by that cause would be where freight earned had had to be handed over to the underwriters of the abandoned ship. *Roura & Forgas* v. *Townend* (1), already cited, is an instance to the contrary. And the principle of *Jackson* v. *Union Marine Insurance Co.* (2), affords another. The vessel there was not in fact a constructive total loss, but if her injuries had been greater and she had been, the result would have been the same. And if the policy were in the form "against constructive total "loss of the ship" (which, of course, means "against "constructive total loss of the ship by perils of the seas or

(1) [1919] 1 K. B. 189. (2) (1874) L. R. 10 C. P. 125.

MacKinnon L.J.

"other insured perils") instead of "against perils of the seas," I am clear that it would cover such a loss as in *Jackson* v. *Union Marine Insurance Co.* (1), and not be limited to cover the very remote risk of freight being lost by its having, when paid, to be paid over to the hull underwriters by reason of abandonment to them.

Finally, I should notice that Goddard J. was of opinion that Lord Wright in *Carras* v. *London & Scottish Co.* (2) expressed the view that this clause 5, in regard to constructive total loss of the vessel, did have this limited effect, namely, that it insured only against the risk of freight going into the pockets of the hull underwriters. I do not think Lord Wright did mean to say that. If he did, it was an obiter dictum, and one uttered during the period when he had descended from the House of Lords to this more fallible tribunal. And if he did say it, I hope I may say without impropriety that, for the reasons I have given, I do not agree with him.

One further ground of defence was raised before us, which either was not raised in the Court below, or is not noticed in the judgment of Goddard J. It was suggested that the defendant can rely on clause 8: "Warranted free from any claim "consequent on loss of time whether arising from a peril of the "seas or otherwise." That clause was invented by underwriters over 60 years ago in order to counteract the result of *Jackson* v. *Union Marine Insurance Co.* (1) The assured there had an insurance on chartered freight against perils of the seas. In the events that happened it became necessary for him to plead: "The ship was damaged by sea perils. The repairs required "to make her able to fulfil her charterparty occupied so much "time that the charterer was entitled to, and did, cancel the "charter. Therefore, there has been a loss of the insured "freight by perils of the seas." And it was held that he was right. The underwriters, being desirous of immunity from any such claim in the future, invented this clause. It will bar any claim whenever it is necessary for the assured to assert the lapse of time as one of the facts establishing his cause of

(1) L. R. 10 C. P. 125.

(2) [1936] 1 K. B. 291, 306.

action. In this case the assured is under no such necessity. He need say nothing about any lapse of time, or of the right of any charterer or goods owner to rely on lapse of time. The insurance is on "freight chartered or otherwise," which can only mean "whether there is a charterparty or not"; and the clause promises payment in full "whether the steamer be fully "or only partly loaded, or in ballast, chartered or unchartered." To a claim under clause 5 the provision in clause 8 can have no application. This, of course, does not mean that clause 8 has no effect on this policy. The policy in its main part is an ordinary policy on freight against the ordinary insured perils. The precise claim made in *Jackson* v. *Union Marine Insurance Co.* (1) could be made upon it, and clause 8 would then operate to defeat such a claim. But clause 5 is an added promise to pay a total loss if either of two events happen. To that added promise, when one of the two events is proved to have happened, I think clause 8 can have no application. The claim is in no conceivable sense "consequent on loss of time." It is simply a claim for a payment which is promised on a certain event, by reason of the happening of that event.

My conclusion, therefore, is that this appeal should be allowed.

GREER L.J. I am authorized by Slesser L.J. to say that he has read both these judgments, and that he agrees with them.

Appeal allowed.

Solicitors for appellants (shipowners): *Holman, Fenwick & Willan.*

Solicitors for respondents (underwriters): *Ince & Co.*

R. F. S.

---

(1) L. R. 10 C. P. 125.

C. A.

1938
May 31.

SIGLEY *v.* HALE AND ANOTHER.

WILSON, THIRD PARTY.

[1938. S. No. 756.]

Practice—Action of negligence against two defendants—Third-party notice by one defendant against the other defendant claiming contribution—Application for order that either defendant have leave to write letter to other defendant making offer on percentage basis—Offer to be treated as notice of payment into Court—No power to make such order—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6*—Rules of the Supreme Court, Order* XXII., *r.* 6 ; *Order* XXX., *r.* 2.

Order XXX., r. 2, of the Rules of the Supreme Court as amended on December 17, 1937 (1), provided as follows : (1.) " Upon the " hearing of the summons [for directions] the powers of the " Court or a judge shall include those specified in this Rule.

(2.) " The Court or a judge may—(*a*) make such order as " may be just with respect to any of the following matters, that " is to say, discovery and inspection of documents, interrogatories, " inspections of real or personal property, and admissions of fact " or of documents " :—

Held, that the Court or a judge has no power under that Rule to make an order giving one defendant in an action for negligence leave to write to another defendant making an offer on a percentage basis to pay such damages as may be awarded, such notice to be treated as a payment into Court in third-party proceedings between the defendants.

APPEAL from a decision of Asquith J. sitting in Chambers.

The plaintiff, Olive Madge Sigley, was the sister of John James Sigley, deceased, and administratrix of his estate.

She brought this action as administratrix of the deceased against the defendants Esme Hale (a married woman) and Derrick Barrett Wilson to recover damages to the estate of the deceased caused by the negligence of one or both of the defendants in the driving of a motor vehicle or vehicles whereby the said John James Sigley was fatally injured at Grimsby, in the county of Lincoln.

It was alleged in the statement of claim that on August 29, 1937, at about 11.30 P.M., the deceased man was riding on the pillion of a motor-bicycle, driven by the male defendant, along a road in Grimsby when the motor-bicycle came into collision with a motor-car, driven by the female defendant, through the negligence of both defendants, the deceased man thereby receiving fatal injuries.

---

(1) [1938] W. N. pp. 60, 61.

The female defendant served upon the male defendant a third-party notice claiming against him such contribution as the Court might think right to award to the female defendant if it were found that she was in any way negligent and that such negligence in any way contributed to the accident the subject-matter of the action.

The female defendant then applied to the Master for further directions in the action, and for an order that either defendant should have leave to write to the other defendant making any offer on a percentage basis she or he might think fit, such notice to be treated as a notice of payment into Court in the third-party proceedings between the defendants.

The Master refused to make the order asked for on the ground that he had no power to make the order.

The female defendant thereupon appealed to Asquith J., the judge in Chambers, who dismissed the appeal on the same grounds as the Master, but gave leave to appeal.

Order XXX., r. 2, of the Rules of the Supreme Court which was in force prior to the New Rules passed on December 17, 1937, provided that "Upon the hearing of the summons [for "directions] the Court or a judge shall, so far as practicable, "make such order as may be just with respect to all the "proceedings to be taken in the action, and as to the costs "thereof, and more particularly with respect to the following "matters: Pleading, particulars, admissions, discovery, inter-"rogatories, inspection of documents, inspection of real or "personal property, commissions, examination of witnesses, "place and mode of trial, and the mode by which particular "facts may be proved at the trial."

This Rule had been revoked by the New Rules passed on December 17, 1937, and the following Rule had been substituted therefor:

"Rule 2.—(1.) Upon the hearing of the summons the "powers of the Court or a judge shall include those specified "in this Rule.

C. A.
1938
Sigley
v.
Hale.

"(2.) The Court or a judge may—

"(*a*) make such order as may be just with respect to any "of the following matters, that is to say, discovery and "inspection of documents, interrogatories, inspections of real "or personal property, and admissions of fact or of documents." (1)

The female defendant appealed, the notice of appeal being served upon the male defendant alone and not upon the plaintiff.

G. J. Paull for the appellant. The Master and the judge had the power to make the order asked for. The Law Reform (Married Women and Tortfeasors) Act, 1935, by s. 6, allowed any tortfeasor liable in respect of damage to a person as a result of a tort to recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage ; the amount of the contribution to be such as may be found by the Court to be just and equitable, having regard to that person's responsibility for the damage. In third-party proceedings, therefore, one defendant may be liable to another defendant for an unquantified proportion of an uncertain amount. One defendant, while denying liability, may offer to pay a certain proportion of the damages awarded to the plaintiff. Such offer ought to be treated as a payment into Court. If an offer to pay an unspecified sum can be treated as a payment into Court, the judge must, under Order XXII., r. 6, take such offer into account in exercising his discretion as to costs. An order such as is asked for was often made in cases in the New Procedure List under the old Order XXX., r. 2 ; but both the Master and the judge considered that the power to make such an order did not exist under the amended Rule. Order XXX., r. 2, before it was amended, was drawn in very wide terms, as it gave the Court or a judge power to " make such order as may be just "with respect to all the proceedings to be taken in the action." Those words have been omitted in the amended Rule ; but that Rule contemplates that the judge may go outside the

---

(1) See [1938] W. N. pp. 60, 61.

C. A.
1938

SIGLEY
v.
HALE.

powers given in sub-para. 2, because sub-para. 1 says the power of the Court or judge shall " include " those specified. A somewhat similar point arose in *Davies* v. *Scott Lewis*. (1) In that case the defendant wished to pay money into Court with a denial of liability, but without pleadings; the plaintiff, however, said that he could only do so with a defence. Pickford L.J. said that in his opinion Order XXX., r. 2, gave the Court power to make an order giving the defendant liberty to do so, and that Order XXX., r. 2, gave a wide power to the Court and should be construed liberally. On the authority of that case the Court has power to make orders analogous to orders made under the Rules where the circumstances are such as were not contemplated by the Rules.

The male defendant did not appear and was not represented.

GREER L.J. In this case Mr. Paull, who appears for the appellant, in the absence of any one appearing for the respondent, has quite rightly called our attention to his difficulties as well as to the arguments in support of his contention. The case has now to be determined under the new Rules which were made on December 17, 1937, since the present editions of the White Book and the Red Book were published, and certain slight changes have been made by the Rules which are now in force.

The appellent desired to have an Order from the judge in Chambers to this effect: " That either defendant do have "leave to write to the other defendant making any offer on "a percentage basis she or he may think fit, such offer to be "treated as a notice of payment into Court in the third-party "proceedings between the defendants"; but the judge in Chambers refused to make such an order, on the ground that he had no power to make such an order.

For some considerable time under the old Rules that obtained in reference to proceedings under the new procedure which are dealt with in Order XXX., r. 2, orders of that kind have frequently been made. Of course, it may be a convenience that such orders should be made; but unless there

---

(1) [1918] W. N. 166.

C. A.
1938

SIGLEY
v.
HALE.

Greer L.J.

is power in the Rules to make them no such order can be made. I have searched in vain for any Rule, and we have not been directed to any Rule of practice, that gives power to the Court to make any such order. The Rule which is now binding on the Court is Rule 6 of the Amended Rules, which provides: "The following amendments shall be made in "Order XXX.: Rules (2.) and (2A.) shall be revoked, and the "following Rule shall be substituted therefor: '2. (1.) Upon "'the hearing of the summons the powers of the Court or a "'judge shall include those specified in this Rule.'" It was suggested by Mr. Paull that that means the summary of the powers which follows, and that they are not the only powers that the Court or a judge possessed, that the powers mentioned are expressly stated to be included, and that necessarily involves that there is power to make Orders other than those which are mentioned in the subsequent part of the Rule. The word "include" only means, in my judgment, a saving of any other Rules of Court under which it might be suggested that this order could be made. I know of no such Rules. The only authority that can be found in support of the argument is *Davies* v. *Scott Lewis*. (1) In that case there was a Rule to the effect that a payment of a sum of money with a denial of liability can only be made with the defence. The Court of Appeal, for reasons which I find it difficult to appreciate, came to the conclusion that the Court might make an order which was half-way between an admission of liability and a denial of liability, in a case where there was an admission of negligence, but a denial of any damage arising from that negligence. That seems to me necessarily to mean a denial of liability, because unless there is damage in addition to negligence no liability is established. Damage is just as essential as the allegation of negligence, but the Court came to the conclusion in that particular case that they could allow the denial of liability, so far as it was concerned with damage, to be raised otherwise than by the defence. Of course, if a similar case ever comes before this Court on similar facts, we will feel ourselves bound, owing to the traditional way in which these

(1) [1918] W. N. 166.

matters are treated, to follow that decision. That case, however, has, in my judgment, no bearing upon the question which we have to decide. I am satisfied that the learned judge in refusing to make the order asked for was right, and that this appeal should be dismissed. As there has been no appearance on the other side the appeal will be dismissed without costs.

SLESSER L.J. I am of the same opinion. In my view the effect of the amendment of Order XXX., which has been produced by the recent new Rule is to curtail the jurisdiction of the judge in this sense: The old Order XXX., r. 2, provided: "Upon the hearing of the summons the Court or a judge shall, "so far as practicable, make such order as may be just with "respect to all the proceedings to be taken in the action." As has been pointed out by my Lord, those words were construed very broadly in the case of *Davies* v. *Scott Lewis* (1), even to the extent of giving the Court power to say that a party could pay money into Court with a denial of liability without pleadings, when previously the Rule, on the face of it, could be read only in a different manner. However that may be, the change in the Rule which has now been made is that those words: "make such order as may be just with respect "to all the proceedings to be taken in the action" have disappeared, and the Rule reads: "Upon the hearing of the "summons the powers of the Court or a judge shall include those "specified in this Rule". Then follow specific powers stated in the Rule. I can only read the Rule extant as meaning that it does not purport to affect such other powers as the Court or judge may otherwise possess. It is therefore a limitation of the generality of the language in the old Order XXX., r. 2. We are told that under the old Order XXX., r. 2, judges have been in the habit, in certain cases, of making orders similar to the one that has been asked for in this case, that is to say, under the recent Act dealing with contribution among tortfeasors they have allowed one defendant to write to the other making an offer on a percentage basis that they will agree

(1) [1918] W. N. 166.

C. A.
1938
Sigley
v.
Hale.
Slesser L.J.

to pay a proportion of such amount of damages as may be found owing to the plaintiff from the tortfeasors in advance before that sum has actually been ascertained. I express no opinion whether that kind of order was, or was not, justified under the old Order xxx., r. 2, as being an order "as may "be just with respect to all the proceedings to be taken in the "action." I am quite clear, however, that no such power exists under the specific language of the new Order xxx., r. 2, where the power is set out, nor, as Mr. Paull is, I think, willing to concede, is there any other power of the Court or judge so to order in any other Rule. It follows, therefore, that either because such a power never did exist, or because it certainly ceased to exist since the passing of the new Rule, the learned judge was right in refusing to allow this order to be made, and the appeal therefore fails.

MacKinnon L.J. I agree, although with regret. The order that the learned judge and Master were asked to make appears to me to be eminently sensible. I have, however, searched in vain to discover any Rule which gives the judge power to do so sensible a thing. With the powers conferred upon the learned judge I think that he was right in the decision to which he came, and this appeal therefore fails.

Solicitors for the appellant Hale: *White & Co.*

R. F. S.

In re SHOESMITH.

C. A.
1938
May 30, 31.

Appeal—Matter of practice and procedure—Application for leave to bring action under Mental Treatment Act, 1930, *s.* 16—*Rape of girl by escaped mental patient—Question whether Hospital Board acted with reasonable care—Whether appeal from leave lies to Court of Appeal or Divisional Court—R. S. C., Order* LIV., *r.* 23—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 3—*Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 16, *sub-s.* 1 (2).

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 3: "In matters of practice and procedure every "appeal from a judge shall be the Court of Appeal."

R. S. C., Order LIV., r. 23, provides that: "In the King's "Bench Division, except in matters of practice and procedure, "the appeal from a decision of a judge at Chambers shall be "to a Divisional Court."

Under s. 16, sub-s. 2, of the Mental Treatment Act, 1930: "No proceedings, civil or criminal, shall be brought against any "person in any court in respect of any such matter as is "mentioned in the last preceding sub-section, without the leave of "the High Court . . . . ":—

Held, by Slesser and MacKinnon L.JJ. (Greer L.J. dissenting) that an appeal from an order of a judge at Chambers giving leave under s. 16 of the Act of 1930 to bring an action against the owners of a certified Institution under the Mental Deficiency Acts was an appeal in a matter of practice and procedure and therefore lay to the Court of Appeal.

Appeal from an order of Asquith J. sitting in Chambers giving Annie Shoesmith, an infant, liberty to commence an action pursuant to s. 16 of the Mental Treatment Act, 1930, against the Lancashire Mental Hospitals Board for damages for personal injuries.

It appeared from the affidavits that David Henry Phillips was admitted on November 7, 1927, to the Calderstones Certified Institution for Mental Defectives under an order made by a judicial authority. Calderstones Institution was a certified Institution under the Mental Deficiency Acts owned and controlled by the Lancashire Mental Hospitals Board.

Phillips, who was twenty-six years of age, was, in the opinion of the medical superintendent of the Institution, a high-grade feeble-minded patient with a mental age of nine years. When first admitted to the Institution he was somewhat untrustworthy, but there had been a marked improvement in his conduct and mental attitude and he had become a reliable patient and had been a patient on parole since May 17, 1937.

Apart from one occasion on May 5, 1936, when he absconded whilst being a patient on parole, Phillips behaved himself satisfactorily in the Institution and was not known to have infringed any of the Institution Regulations except that shortly before he absconded on October 13, 1937, he was found to be smuggling uncensored letters to some person outside the Institution.

When it was discovered that Phillips had infringed his parole privileges by posting a letter contrary to the rules laid down for parole patients, the assistant medical superintendent withdrew Phillips's parole and directed a male nurse to take him to the refractory ward. The nurse was about to take Phillips to the refractory ward when Phillips said he wanted to collect some of his personal belongings which he had placed in a box in the workshop, as he was afraid they would be stolen. The workshop was a separate block about a quarter of a mile away from the dining-room and the main block, where the patients lived.

The nurse was accompanying the patient towards the workshop about 1 P.M. when Phillips suddenly bolted and ran away from the nurse through a thick shrubbery and escaped. The nurse blew his whistle and followed after Phillips, who was, however, soon lost to view. The nurse then telephoned for assistance.

Calderstones Institution was surrounded by large grounds, but the actual portion of the grounds from which Phillips escaped was rough and uncultivated. The Institution was partly surrounded on three sides by iron railings about six feet in height. The Institution grounds fronting the highway were mainly unfenced and the greater part of the frontage was occupied by staff cottages, attached to which were small gardens. It was not the practice to surround the buildings of certified Institutions such as Calderstones with high walls and unclimbable fences.

At about 5 P.M. on the same day, October 13, 1937, on which he escaped, Phillips attacked and raped Annie Shoesmith, a girl of fourteen years of age. Phillips was subsequently prosecuted at the Liverpool Assizes for rape and was convicted and ordered to be detained in custody until an order arrived transferring him from Calderstones to Rumpton Mental Defective Institution.

Application was subsequently made to Asquith J., the judge at Chambers, on behalf of Annie Shoesmith, for liberty to commence an action pursuant to s. 16 of the Mental Treatment Act, 1930 (1), against the Lancashire Mental Hospitals Board for damages for personal injuries. Asquith J. on April 8, 1938, made an order giving leave to Annie Shoesmith to commence proceedings by her father and next friend as she was an infant. The judge gave leave to the Lancashire Mental Hospitals Board to appeal.

The Lancashire Mental Hospitals Board appealed.

Ralph Etherton for the appellants.

C. N. Shawcross for the respondent. There is a preliminary objection to the hearing of this appeal inasmuch as, not being a matter of practice or procedure, the appeal lies to the Divisional Court and not to the Court of Appeal: see Order LIV., r. 23, and s. 31, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925. Greer L.J. said in *In re Withers & Co.* (2), that " a decision to be one in a matter "of practice and procedure must be a decision in the course "of an action or other matter, in the High Court." In the

---

(1) Mental Treatment Act, 1930, s. 16, sub-s. 2: "No proceedings, "civil or criminal, shall be brought "against any person in any court "in respect of any such matter as "is mentioned in the last preced"ing sub-section, without the "leave of the High Court, and "leave shall not be given unless "the court is satisfied that there "is substantial ground for the "contention that the person, "against whom it is sought to "bring the proceedings, has acted "in bad faith or without reason"able care."

(2) [1930] 2 K. B. 192, 196.

C. A.
1938

SHOESMITH, *In re.*

present case the order of the judge was not made in a pending action. The order was one dealing with a question of substantive right and not made in a matter of practice and procedure. It is true that in *re an intended action by Frost* (1), the Court of Appeal entertained an appeal from an order of a judge giving leave to bring an action under s. 16 of the Act of 1930; but, if a Court has no jurisdiction to hear an appeal, it cannot give itself jurisdiction to hear the appeal merely because counsel do not take the objection.

[SLESSER L.J. referred to *Lever Brothers, Ld.* v. *Kneale & Bagnall.* (2)]

Ralph Etherton for the Lancashire Mental Hospitals Board. Under s. 330 of the Lunacy Act, 1890, the onus would have been upon the Board to show that they had acted in good faith and with reasonable care, but the onus of proof has now been shifted by s. 16 of the Mental Treatment Act, 1930. Under sub-s. 2 of that section a person who wishes to obtain the leave of the High Court to commence proceedings must show that there is substantial ground for the contention that the person against whom it is sought to bring the proceedings has acted in bad faith or without reasonable care. In order to satisfy the requirements of that section it is necessary for the applicant to go far beyond showing that a patient who is not dangerous has escaped on a previous occasion or that he has conveyed letters out of the Institution contrary to regulations. With regard to the preliminary objection Buckley L.J. said in *Yonge* v. *Toynbee* (3), that "The expression 'practice and procedure' is not confined "to steps in the action itself, but covers also matters in "connection with the action." Smith L.J. in *Watson* v. *Petts* (4), said that "The practice and procedure mentioned "in the section cover matters of practice and procedure in "connection with a cause or matter in the High Court." Lord Esher M.R. in *Black* v. *Dawson* (5), said: "In this case "an ex parte application was made to the judge at chambers

---

(1) [1936] 2 All E. R. 182.
(2) [1937] 2 K. B. 87.
(3) [1910] 1 K. B. 215, 220.
(4) [1899] 1 Q. B. 54.
(5) [1895] 1 Q. B. 848.

"for leave to serve the writ of summons out of the jurisdiction. "That was a step in procedure, and if the judge had refused "the application an appeal would have lain to this Court with "leave." Obtaining the leave of the Court to commence proceedings under s. 16 of the Act of 1930 is very similar to obtaining the leave of the Court to serve a writ out of the jurisdiction. The Court of Appeal has already in *In re Frost* (1) entertained jurisdiction in a similar matter.

C. N. Shawcross in reply on the preliminary point. If the test laid down by Greer L.J. in *In re Withers & Co.* (2) is correct, this appeal ought to have been taken to the Divisional Court. Until the leave of the Court to commence proceedings is obtained, an applicant has no right against the proposed defendant. Once a writ has been issued, the obtaining of the leave of the Court to serve it out of the jurisdiction is a matter of practice and procedure. It is true that the intention of the applicant was to commence an action in the High Court, but s. 16 of the Act of 1930 refers not only to leave to commence actions in the High Court, but also to leave to commence criminal proceedings and actions in the county court. The obtaining of leave to commence proceedings could not be a matter of practice and procedure if the proceedings were commenced in courts other than the High Court. The dictum of Buckley L.J. in *Yonge* v. *Toynbee* (3), was obiter and is not binding. That dictum can only apply to an existing action and cannot apply retrospectively to an intended action. The Court of Appeal held in *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (4), that an appeal from a judge at Chambers directing an arbitrator to state a case lay to the Divisional Court and not direct to the Court of Appeal, inasmuch as there was no question of practice and procedure in a cause or matter in the High Court. [*Simbro Trading Co.* v. *Posograph (Parent) Corporation, Ld.* (5), and *In re Colman and Watson* (6), were also cited.]

(1) [1936] 2 All E. R. 182.
(2) [1930] 2 K. B. 192, 196.
(3) [1910] 1 K. B. 220.
(4) [1905] 1 K. B. 366.
(5) [1929] 2 K. B. 266.
(6) [1908] 1 K. B. 47.

GREER L.J. In this case two points are raised. In the first place, the respondent says, as a preliminary point, that this Court has no jurisdiction to deal with this appeal because, as the law now stands, since 1894, the appeal must be to a Divisional Court and not to the Court of Appeal, because the matter involved is not a matter of practice and procedure.

Until 1894 appeals on questions of practice and procedure went from the judge in Chambers to a Divisional Court and from the Divisional Court to the Court of Appeal. That was thought to be an unnecessarily expensive method of dealing with matters of practice and procedure in actions, and a Statute was passed in 1894—the Supreme Court of Judicature (Procedure) Act, 1894—to alter that and to provide that appeals in matters of practice and procedure should now come direct to the Court of Appeal instead of going through the Divisional Court.

The matter we have to deal with in this case is an application that was made to a judge in Chambers under s. 16, sub-s. 2 of the Mental Treatment Act, 1930, for leave to commence proceedings for personal injuries. Sub-s. 2 says this: "No "proceedings, civil or criminal, shall be brought against any "person in any court in respect of any such matter as is mentioned in the last preceding sub-section, without the leave of "the High Court, and leave shall not be given unless the court "is satisfied that there is substantial ground for the contention "that the person, against whom it is sought to bring the "proceedings, has acted in bad faith or without reasonable "care." Of course, there is no question in this case of bad faith, but it was contended before the judge that there was substantial ground for the contention that the authorities had acted without reasonable care. The learned judge, directing his mind to that question, decided that in his view there was substantial ground for the contention that the proprietors of the Institution had acted without reasonable care.

If that be right, it does not seem to matter very much whether the view which I have expressed in the course of the argument, and to which I adhere, is right or is wrong. If it is wrong, and if the matter is a matter of practice and procedure, then I think the learned judge was right in his conclusion; but it is necessary that something should be said about the preliminary point because, if the preliminary point is right, we have no jurisdiction to say anything at all either one way or the other.

In the case of *In re Withers & Co.* (1), I ventured to express my view in these words: "The decisions and dicta of judges "who have had to consider what are matters of practice and "procedure as distinct from final decisions are very conflicting, "and in those circumstances I feel that this Court is in a "position to exercise its own judgment in the matter. I have "come to the conclusion that in this case we ought to apply "the distinction, well known to jurists, which exists between "substantive decisions and adjective decisions. In the latter "they would include decisions on practice and procedure. "One would think that decisions as to matters of practice "and procedure are those given in the course of legal proceedings to get a final result. In my judgment, a decision "to be one in a matter of practice and procedure must be a "decision in the course of an action or other matter in the "High Court." I adhere to the view I expressed in that case because the Judicature Act and the Act of 1894 were concerned with the jurisdiction of a Court which was created first in the Judicature Act and under which jurisdiction was given by that Statute to deal with actions which were brought in the High Court. I note that, though in this case it is admitted that the intention was to bring an action in the High Court, sub-s. 2 of s. 16 deals with an application which has to be made whether the proceedings are criminal or civil, and in whatever court the proceedings may be brought. That has to be interpreted as applying to an application made in reference to matters with which the High Court may have no concern whatsoever, because the proceedings may be criminal and may be in a County Court or in the Mayor's Court or the Liverpool Court of Passage—in any court whatsoever.

It seems to me that it is impossible to hold that an application of that sort is an application with reference to proceedings in the High Court. I think it is one of those cases in which, unfortunately, an appeal, if there be an appeal, is to the Divisional Court. The application is made as a substantive application to a judge of the High Court (who is the High Court for this purpose) and then, there being no provision that the appeal shall be to the Court of Appeal, the appeal must necessarily be, as it always is, independently of the Rule relating to practice and procedure, an appeal to a Divisional Court.

---

(1) [1930] 2 K. B. 192, 196.

There have been some expressions of opinion to the contrary, but there has been, so far as we can discover and so far as Counsel can discover, no case in which an application, preliminary to the issue of the writ, has ever been dealt with as a case of practice and procedure. Unfortunately, in two cases to which our attention has been called, we did in fact exercise jurisdiction where the point had not been argued and in which we ought to have refused to accept jurisdiction, but, in my judgment, we are entitled to say that we are not bound by those decisions which were per incuriam because the point had never been argued before us.

I wish to repeat what I said in the course of the argument, that the Court has more than once, sitting as a Court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a Court sitting with a quorum of members can do the same thing. Although, as a matter of courtesy and of usual practice, this Court deems it right to follow its own decisions in earlier cases, there is no rule of law which compels it to do so.

For these reasons, I think that this preliminary objection is a good one and ought to succeed. If I should happen to be wrong, and the view which I understand my brethren are about to state is right, then I would dismiss this appeal on the ground that the learned judge was right in the view which he took. So, that being the case, it may be that my views on the question whether it is practice and procedure may not matter, because, assuming it is practice and procedure, I agree with the decision of the learned judge.

SLESSER L.J. In this case a preliminary objection to the hearing of this appeal has been taken by the respondent, which is based upon s. 31, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that "In matters of practice and procedure every appeal from a "judge shall be to the Court of Appeal." They also rely upon Order 54, r. 23, to the effect that "In the King's Bench "Division, except in matters of practice and procedure, the "appeal from a decision of a judge at Chambers shall be to a "Divisional Court."

It is said on behalf of the respondent that this appeal is an appeal not on a matter of practice and procedure and therefore can properly only be heard in the Divisional Court.

There is no question, as my Lord has already stated, but that this Court has more than once entertained an appeal on the question of leave to bring proceedings being granted or refused under s. 16 of the Mental Treatment Act, 1930, and one of such cases is *Re an intended action by Frost.* (1) There are other unreported cases.

I start with the opinion expressed by Lord Ellenborough, in the case of *Moorsom* v. *Kymer* (2), that "It is extremely "dangerous to shake the authority of decided cases," more particularly where they deal with questions of jurisdiction, although I respectfully agree with my Lord that there is no rule of law that prevents this Court, either sitting with a full complement of its members or with a quorum of its members, from reviewing its own decisions. Starting with that view, I have great hesitation in acceding to the argument that this Court should now repudiate a jurisdiction entertained as recently as last year, notwithstanding the fact that on that occasion the point of jurisdiction was not argued. Apart, however, from that hesitation, I have come to the conclusion on a consideration of the actual merits of the argument, that

(1) [1936] 2 All E. R. 182.

(2) (1814) 2 M. & S. 303, 313.

C. A.
1938
SHOESMITH,
In re.
Slesser L.J.

this Court has jurisdiction to entertain the present appeal. The section which we have here to consider, s. 16 of the Mental Treatment Act, 1930, places a preliminary clog upon the right of persons to bring proceedings, civil or criminal, in the circumstances which have already been stated by my Lord, without the leave of the High Court. There follow the grounds on which leave should not be given—namely, " leave "shall not be given unless the court is satisfied that there is "substantial ground for the contention that the person, against "whom it is sought to bring the proceedings, has acted in bad "faith or without reasonable care." The Statute also appears to contemplate, in sub-s. 4, that an application to the judge to obtain the leave referred to in the section, shall be deemed, for the purposes of the Public Authorities Protection Act, to be the commencement of the proceedings and not the date of the issue of the Writ.

In my view, the leave which is sought is part of the proceedings. I agree with Mr. Shawcross that if the proceedings contemplated, for which leave was asked, were proceedings other than proceedings in the High Court, very difficult questions would arise. If they were criminal proceedings, I should imagine that it might be argued that this Court has no jurisdiction in any event because it would be an appeal in a criminal cause or matter, but the proceedings might be civil proceedings brought in a court other than the High Court. The particular facts of this case show clearly (and Mr. Shawcross very frankly does not dispute the point) that here the proceedings for which leave was sought were proceedings in the High Court. Before the learned judge, costs in the cause, in the High Court, as I understand it, were ordered, and also, after leave was given and before this appeal was heard, in accordance with the leave given, a writ was issued in the High Court in the District Registry. Therefore, what I am about to say is upon the assumption, which is an assumption founded upon fact, that the leave which was given by the learned judge in this case, upon which the appeal is now to be considered, was leave given in civil proceedings in the High Court.

C. A.
1938
SHOESMITH
In re.
Slesser L.J.

On that assumption, it seems to me that the matter was one of practice and procedure. The nearest case which I can find to the present one, albeit it was one where the Writ had been issued, is *Black* v. *Dawson*. (1) In that case, it was held that, " An application by a defendant to discharge an "order at chambers, made ex parte, giving leave to serve the "writ upon him out of the jurisdiction, or to set aside the "service, should be made by a summons at chambers, and not "by motion in the Divisional Court or in the Court of "Appeal." Lord Esher, said this : (2) " In this case an ex "parte application was made to the judge at chambers for "leave to serve the writ of summons out of the jurisdiction. "That was a step in procedure, and if the judge had refused "the application an appeal would have lain to this Court with "leave." Lopes and Rigby L.JJ. concurred. Therefore, it has been held by the Court of Appeal that an appeal from leave to serve a writ or summons out of the jurisdiction would be a matter of practice and procedure. There, although the writ had been issued, it would have been entirely abortive with regard to a defendant out of the jurisdiction unless leave had been given. That seems to me to go a long way towards establishing that the issue of an effectual writ (if I may use the phrase) is not necessarily the beginning of the proceedings. It has been held that a writ which requires leave in order that it may be served and so be effectual is a proper subject-matter of appeal direct to this Court as being a question of practice and procedure.

I am also influenced by the definition of " practice and "procedure" which is to be found in the judgment of Buckley L.J. in *Yonge* v. *Toynbee*. (3) He says : " The "expression ' practice and procedure ' is not confined to steps "in the action itself, but covers also matters in connection "with the action." The matters there considered were matters happening after the writ ; but equally I think the language is applicable to cases of leave to issue a writ, which seem to me, properly understood, to be matters in connection with the action.

---

(1) [1895] 1 Q. B. 848.
(2) Ibid. 849.
(3) [1910] 1 K. B. 215, 220.

C. A.
1938
SHOESMITH, *In re.*
Slesser L.J.

I would next refer to the case which my Lord mentioned, the case of *In re Withers & Co.* (1), in which my Lord drew, if I may say so, with respect, the very useful distinction which exists between substantive decisions and adjective decisions, saying, "In the latter they would include decisions "on practice and procedure." Scrutton L.J. had said (2): "I "have come to the conclusion that it is neither practice nor "procedure, but is a question of substantive right under the "Solicitors Act."

In my view, in the present case, this application for leave to start proceedings is not a question of substantive right but is adjectival to the substantive right which is sought to be achieved. I am fortified in that view by the observations of Lush L.J. in the case of *Poyser* v. *Minors* (3), where he says, "'Practice' in its larger sense—the sense in which it was "obviously used in that Act, like 'procedure' which is used "in the Judicature Acts, denotes the mode of proceeding by "which a legal right is enforced, as distinguished from the law "which gives or defines the right, and which by means of the "proceeding the Court is to administer the machinery as "distinguished from its product." I think, taking that distinction, the obtaining of leave in this case was a mode of procedure by which the legal right was to be enforced and was machinery as distinguished from the product which would be the damages that ultimately it was hoped to obtain for the negligence contemplated.

I have dealt with the matter at some length, since, on one view, the Court was formerly in error in this matter and, being a matter of jurisdiction, it is one of general importance. I have come to the conclusion that this Court was right in its former view as expressed in *Frost's* case (4), notwithstanding the fact that it did not have the benefit of the argument of Counsel, that an appeal under this section should come to this Court as being a matter of practice or procedure.

That brings me to the substance of the appeal itself, which I think I must deal with because of the argument of Mr.

---

(1) [1930] 2 K. B. 192, 196.
(2) Ibid. 195.
(3) (1881) 7 Q. B. D. 329, 333.
(4) [1936] 2 All E. R. 182.

Etherton, that the Board of Control and the keepers of this Institution regard this matter with grave apprehension should the decision ultimately be different from that which they hope it will be.

In my view, the evidence in this case fully justified the learned judge in coming to the opinion that there was substantial ground for the contention that the persons against whom it was sought to bring proceedings have acted without reasonable care. It is not necessary to consider in detail the different affidavits, which really do not substantially contradict one another, but the fact is that the medical officials at this Institution regarded the man who escaped and caused such grievous injury to the plaintiff as a man who, though being a defective and a high grade feeble-minded patient with a mental age of nine years, could safely be given a measure of freedom; and although it is admitted that he was inclined to dictate to his colleagues and become irritated when they did not accede to his commands (a weakness alas! not confined to insane persons), nevertheless they did regard him as a man who could safely be left on parole. Their case is that on the occasion when it was decided, just before his escape, to put him into confinement in the refractory ward, it was merely because he had written a letter, which had reached someone outside the Institution, without sanction and without proper censorship. It is arguable (and I express no opinion about it) that, the prognosis and diagnosis of this man's mental condition which will have to be considered at the trial, was itself conducted incompetently, and that a reasonably competent alienist or psychologist ought to have known that this man, albeit of feeble mental stature, was not merely mentally defective in that sense but was also morally defective within the meaning of a "mentally defective" in s. 1 of the Mental Deficiency Act, 1913. I say nothing about this because this is a matter which may have to be investigated at the trial, but the fact is that this man, who was stated to be, if I may use a popular phrase, quite harmless, and was apparently let out on parole without any adequate step taken for his protection or the protection of the public, did turn out to be a very dangerous person of criminal tendencies immediately he escaped, and that matter may have to be considered. Secondly, there is the consideration that the organization for the retention of persons, even after they have been ordered into confinement, as this man was, were utterly inadequate. The male nurse appears to have been a confiding person very readily deceived by this man, who said he wished temporary liberty in order to redeem some of his tools, and on being given his liberty was thus enabled to escape. The male nurse was not in a position, owing to his footwear, and possibly because of his want of an athletic training, which the assailant had received, and which the male nurse apparently had not, to catch up the patient; the male nurse wore heavy boots, the man who escaped being in light shoes. Thirdly, it appears that the telephonic arrangements were quite inadequate to detain him; fourthly, there is the evidence contained in the affidavits that, although this man was said to be a mere mental defective fit to be at large, immediately his escape was known a male nurse scoured the countryside in a motor-car, the police were at once informed of the matter, and a detailed description was sent out. Fifthly, there is the evidence that while on parole on a previous occasion he had absconded. For all these reasons, I think there was adequate material on which the learned judge could come to the conclusion that there was substantial ground on which the case should proceed.

In my view, therefore, on this head, I agree with my Lord that this appeal fails.

MacKinnon L.J. Conceiving, as I do, that the purpose of this, or any other Court, is to do justice between the parties who appear before it, it does seem to me to be monstrous that our time has been taken up in trying to decide whether, on the obscure words of an Act of Parliament, parties have rightly come to this Court or ought to have gone to another room down the corridor in which three other judges are, or may be, sitting as a Divisional Court. This obscure problem puts the parties and their advisers in the extremely difficult and potentially expensive position of having to know to which

Court they ought to go. In this case the present appellants came here and it is objected that they ought to have gone there. If they had gone there, so nice is the question involved that I think it highly likely that there they would have been met with the objection that they ought to have come here.

The Act of 1894 enacted that appeals from a judge in Chambers on matters of practice and procedure should come direct to this Court. Inferentially, or consequentially, Order 54, r. 23, lays it down that "except in matters of practice "and procedure the appeal from a decision of a judge at "Chambers shall be to a Divisional Court." The question, therefore, is what is a matter of practice and procedure? I think this is an extremely obscure problem. I cannot think it can be true that there can only be a matter of practice and procedure after a writ has been issued. The Arbitration Act, 1934, by s. 8, provides various powers of the Court by way of assistance in arbitrations. A Court may make Orders for various things, such as discovery, examinations of witnesses before an examiner, securing the amount in dispute in the reference, the detention, preservation or inspection of any property or thing which is the subject of the reference. I think any order made in Chambers on any application under that section would clearly be a matter of procedure and an appeal in regard to it would lie to this Court; but it would be a matter in which no writ had been issued, for the simple reason that it arose out of an arbitration. Under Order XI., "Service out of the jurisdiction," if a judge grants or refuses leave and there is an appeal from his decision, there is no doubt, I think, that it comes to this Court. The distinction, apparently, which has been suggested, is that if you go to a judge in Chambers and say: "May I serve a "writ which I have taken out?" that is a matter of practice and procedure; but if you go to a judge in Chambers, under this Act, and say: "May I take out a writ and serve it?" that is not a matter of practice and procedure. That only illustrates the extreme subtlety and nicety involved in this, I almost said, ridiculous question. The same problem that arises under this Section of the Mental Treatment Act, 1930, would exactly arise under s. 51, sub-s. 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, which deals with the procedure by which people may be put on the list as notorious litigants, and anybody on that list may not institute proceedings unless leave is given by a Court or judge on an application by him. That is precisely the same thing. I cannot think that, if the question decided by the judge in Chambers is whether a writ that has been issued may be served, it is a matter of practice and procedure, and if the question is whether a writ may be issued and served it is not a matter of practice and procedure. It is almost impossible to suggest a definition. I think practice and procedure includes any matter in connection with an action or a proposed action in the High Court. But even that would not cover the case under the Arbitration Act to which I have referred.

That being so, I think that the present appellants, in attempting to solve this extremely difficult problem, were right in coming to this Court and would be wrong in going to the Divisional Court. If they had gone to the Divisional Court, it is quite likely that it might have been decided the other way. That is as regards jurisdiction.

On the question of substance in the appeal, I express no opinion whatever as to the merits of this proposed action. It may very well be that when it is heard it ought to fail. The only question is whether the applicant brought forward such evidence that the Court ought to be satisfied that there is substantial ground for the contention that the person against whom it is sought to commence proceedings had acted without reasonable care. If it is a matter that has some substance and, therefore, one deserving of being properly investigated in a trial, then leave to start the proceedings ought to be given. I think the applicant did bring forward sufficient evidence of that and, therefore, the learned judge was right in the decision at which he arrived.

GREER L.J. I want to add a reference to the case to which I referred in the course of the argument and to the judgment in which the Court of Appeal overruled an old decision of the

Court of Appeal consisting of three members. That was the case of *Wynne-Finch* v. *Chaytor*. (1) It is a case I very well remember because the case that was overruled was a case in which I was Counsel alone in an appeal from a matter which had been heard by an Official Referee. The case was in the List on Monday and the whole of the week and on Friday afternoon the point was taken that there could not be an appeal without leave as it was an interlocutory matter. I then asked the Court to give me leave. They said that they did not do that on Fridays, I must come back on Monday. I had to come back on the Monday and ask for leave and they gave me leave. We then went to the other branch of the Court and succeeded in our appeal. I remember the case so well because it cost me a great deal more than the fee I earned. But the decision that leave was required was ultimately overruled by the case I have mentioned and was held to be wrongly decided, although it had stood in the White Book and the Red Book for nine or ten years.

Preliminary objection overruled.
Appeal dismissed.

Solicitors for appellants: *Norton, Rose, Greenwell & Co., for Sir George Etherton, Preston.*

Solicitors for respondent: *Gibson & Weldon, for Henry Backhouse & Son, Blackburn.*

---

(1) [1903] 2 Ch. 475.

R. F. S.

1938
April 8.

ALLEN AND ANOTHER *v.* HORNCHURCH URBAN DISTRICT COUNCIL.

[RESPONDENTS' APPEAL.]

Local Government—Private Street Works—Street used both by local and through traffic—Apportionment on frontagers only—Street wider than required by local traffic only—No resolution by local authority to vary widths of carriageway and footways nor to contribute to expenses —Reasonableness of works—Power of justices to consider benefit to others than frontagers—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 7, 10, 15*—Public Health Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 71), *s.* 35.

A local authority resolved to make up a street under the Private Street Works Act, 1892, and that in making the apportionment of expenses regard should be had to the greater or less degree of benefit to be derived by the premises fronting, adjoining, or abutting on the street. They passed no resolution either under s. 35 of the Public Health Act, 1925, for varying the relative widths of the carriageway and footways of the street—namely, a 24 ft. carriageway with two 8 ft. footways, nor under s. 15 of the Private Street Works Act, 1892, to contribute any part of the expenses. The road was one which was used both by local and through traffic.

The justices having dismissed objections by certain frontagers, they appealed to quarter sessions, and the appeal committee, being of opinion that a 20 ft. carriageway would suffice for the needs of the local traffic, quashed the resolution and apportionment on the ground that it was unreasonable to cast on the frontagers the greater burden rendered necessary for the through traffic from which they derived no benefit:—

Held, that the burden is cast on the frontagers by statute, and that the discretionary power to vary the normal rule of apportionment according to frontage is given to the local authority, and not to the justices, who are confined to considering the reasonableness of the amount of the burden, not of its incidence.

Decision of *Chester Corporation* v. *Briggs* [1924] 1 K. B. 239 that the justices must not either directly or indirectly secure the effect of a resolution which the local authority have not seen fit to pass, approved; and dissenting dictum of Salter J. at p. 247 that "the justices are entitled to consider, among other things, "whether the proposed works are reasonable in the sense that "it is reasonable that such works should be done at the "frontagers' expense," disapproved.

RESPONDENTS' APPEAL by case stated from a decision of the appeal committee of the court of quarter sessions for the county of Essex.

At a sitting of the appeal committee on May 28, 1937, Percy Douglas Allen and William Howard Alexander Ashworth appealed against a decision of the court of summary jurisdiction for the petty sessional division of Romford dismissing objections taken to a provisional apportionment made by the respondent council's surveyor in accordance with the Private Street Works Act, 1892, and approved by the respondent council pursuant to the said Act, in respect of a street known as Betterton Road, Hornchurch, in the county of Essex, and confirming such apportionment.

The grounds of objection under s. 7 of the Private Street Works Act, 1892 (1) (so far as relevant to the case), were as

---

(1) The Private Street Works Act, 1892, s. 7: "During the said "month any owner of any pre"mises shown in a provisional "apportionment as liable to be "charged with any part of the "expenses of executing the works "may, by written notice served "on the urban authority, object "to the proposals of the urban "authority on any of the following "grounds; (that is to say,) . . . . "(*d*) That the proposed works are "insufficient or unreasonable, or "that the estimated expenses are "excessive; . . . ."

Sect. 10: "In a provisional "apportionment of expenses of "private street works the appor"tionment of expenses against "the premises fronting, adjoining, "or abutting on the street or part "of a street in respect of which "the expenses are to be incurred "shall, unless the urban authority "otherwise resolve, be appor"tioned according to the frontage "of the respective premises; but "the urban authority may, if they "think just, resolve that in set"tling the apportionment regard "shall be had to the following "considerations; (that is to say,)

"(*a*) The greater or less degree "of benefit to be derived by any "premises from such works;

"(*b*) The amount and value "of any work already done by "the owners or occupiers of any "such premises.

"They may also, if they think "just, include any premises which "do not front, adjoin, or abut on "the street or part of a street, but "access to which is obtained from "the street through a court, pas"sage, or otherwise, and which in "their opinion will be benefited "by the works, and may fix the "sum or proportion to be charged "against any such premises "accordingly."

Sect. 15: "The urban author"ity, if they think fit, may at any "time resolve to contribute the "whole or a portion of the "expenses of any private street "works. . . . ."

The Public Health Act, 1925, s. 35: "Upon the exercise by an "urban authority of the powers of "section one hundred and fifty of "the Public Health Act, 1875, "or of the Private Street Works "Act, 1892, as the case may "be, in relation to any street, "the urban authority shall have "power to require a variation follows: "(*a*) That the proposed works are unreasonable and "the estimated expenses are excessive in the following "respects:—(1.) The carriageway is proposed to be constructed to a width of 24 feet"—which was the existing width —"whereas a width of 20 feet is sufficient and reasonable for "a road of this character; (2.) That the proposed laying of a "strip of footway with tarred limestone paving is unnecessary, and such strips should be left uncovered as "margins for trees or shrubs."

The grounds of appeal to quarter sessions (so far as relevant to the case) were as follows: "(*a*) That the justices were wrong "in holding that the proposed works were reasonable within "the meaning of s. 7 (*d*) of the Private Street Works Act, "1892. (*b*) That the justices were wrong in holding that the "estimated expenses of the proposed works were not excessive "within the meaning of s. 7 (*d*) of the Act. (*c*) That the decision "of the justices was contrary to law."

It was ordered by the appeal committee that the appeal be allowed with costs, and that the resolution, plans and sections, estimate and provisional apportionment be quashed.

The following facts were proved or admitted before the appeal committee:—

(*a*) The Private Street Works Act, 1892 (hereinafter referred to as "the Act"), had been adopted by the respondent council, and was in force in the urban district of Hornchurch.

(*b*) The respondent council were the urban sanitary authority for the district, and Betterton Road was a street, within the meaning of the Act, and was situate in the respondent council's district.

(*c*) The respondent council by resolution dated September 17,

---

"of the relative widths of the "carriageway and footway or footways of the street: Provided "that no greater charge shall be "imposed on a frontager by reason "of any such variation than could "have been imposed in respect of "a carriageway or footway of the "width prescribed for a new "street of the same class by any "byelaw or enactment with "respect to the width of new "streets which applied to the "street when it was laid out, and "any sum in excess of that charge "shall be borne by the urban "authority."

1935, resolved to do certain private street works with respect to the said street, and pursuant to s. 10 of the Act further resolved that in settling the provisional apportionment of expenses of such works regard be had to the following consideration—namely, the greater or less degree of benefit to be derived by any premises from such works.

(*d*) The surveyor of the respondent council duly prepared a specification of the works referred to in the said resolution with plans and sections, and an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act, and in apportioning the estimated expenses had regard to the greater or less degree of benefit to be derived by any premises from such works.

(*e*) The specification, plans, sections, estimate and provisional apportionment comprised the particulars prescribed in Part I. of the Schedule to the Act, and were duly submitted to the respondent council and approved by them by resolution dated January 19, 1937.

(*f*) The said resolution was duly published and served on owners (including the appellants) of premises liable to be charged in the provisional apportionment.

(*g*) The requirements of the Act as to deposit and inspection were duly complied with.

(*h*) The developer's layout plans and the notice of intention to lay out Betterton Road deposited with the respondent council (which were in evidence before the appeal committee) showed a 24 ft. carriageway with two 8 ft. footpaths.

(*i*) The plans, sections and estimate, and the specification of the works prepared by the respondent council's surveyor provided for a waterbound granite carriageway 24 ft. wide, with two 8 ft. paths, each with 5 ft. of flagstone paving 2 ft. 6 ins. of tarmac and 6 ins. kerb.

(*j*) That was the respondent council's standard specification for roads with a carriageway 24 ft. wide.

(*k*) Betterton Road was one of several roads connecting the arterial road leading from Tilbury to London with a road leading from Dagenham to Hornchurch, and it was probable that as such connecting road it would be used by through traffic.

(*l*) A road with a carriageway with a width of 20 ft. would be sufficient to meet the requirements of the frontagers to Betterton Road.

(*m*) The respondent council had not exercised the power conferred on them by s. 35 of the Public Health Act, 1925, to require a variation of the relative widths of the existing carriageway and footways of the street.

On the part of the respondent council it was contended :—

(1.) That as the street had been laid out in accordance with the layout plans and the notice of intention to lay out the street, namely, with a 24 ft. carriageway and two 8 ft. paths, the respondent council were bound to take the street as they found it unless they exercised their powers under s. 35 of the Public Health Act, 1925, and were entitled to make it up to the full width thereof.

(2.) That the question of the variation of the relative widths of the carriageway and footways in pursuance of s. 35 of the Public Health Act, 1925, was one for the respondent council's discretion.

(3.) That the respondent council not having exercised the power conferred on them by s. 35 of the Public Health Act, 1925, of requiring a variation of such relative widths, they could not be compelled to require such variation.

(4.) That it was not competent for the appeal committee to alter such relative widths or to hold the proposed works unreasonable on the ground that they did not vary the existing width of the carriageway.

On the part of the appellants it was contended :—

(1.) That the proposed works in Betterton Road were partly for the benefit of the frontagers and partly for the benefit of the general public.

(2.) That a carriageway with a width of 24 ft. was necessary only because of the through traffic, and that a carriageway with a width of 20 ft. would be sufficient for the local traffic.

(3.) That it would be unreasonable to throw upon the frontagers the burden of works which were in part for the benefit of others.

(4.) That while the appeal committee had no jurisdiction to require the respondent council to exercise their powers under s. 35 of the Public Health Act, 1925, there was nothing in law which compelled the committee to dismiss an objection pursuant to s. 7 of the Private Street Works Act, 1892, if they were satisfied that the respondent council was endeavouring to throw upon the frontagers the cost of works which were partly for the benefit of the frontagers and partly for the benefit of others.

(5.) That having regard to the fact that the houses in Betterton Road were small and the frontagers were of small means, it was unreasonable to throw upon the frontagers the burden of making up each of the footways in excess of a width of 4 ft. 7 ins.

The appeal committee decided that a 20 ft. carriageway was reasonably sufficient for the needs of the frontagers, and to the extent that the works would impose upon the frontagers an expense greater than that of a 20 ft. carriageway such works were unreasonable. It was accordingly ordered that the appeals of the appellants be allowed with costs, and that the resolution, plans and sections, estimate and provisional apportionment be quashed.

The question for the opinion of the Court on the respondent council's appeal, was whether the appeal committee came to a correct determination in law.

Trustram Eve K.C. for the appellants. It may shorten matters if I say that I accept the whole of the respondent council's contentions set out in the case.

Montgomery K.C. and *Percy Lamb* for the respondent council. The point that arises is this: Can quarter sessions say that works are not necessary, if in fact they mean by that, as they have said in this case that they do mean, that they think the frontagers ought not to be called on to pay the whole of the charges, and that in effect the local authority ought to have passed a resolution which they have not passed, and which would have had the result of throwing a considerable part of the burden on the general ratepayers of Hornchurch? In this case the resolution would have been under s. 35 of the Public Health Act, 1925, to require a variation of the relative widths of the carriageway and footways of the street. Before 1925 there was no power in the local authority to vary the widths of the road as made by the building owner in accordance with the plans deposited by him. Since 1925 they may do so subject to provisions which mean that they must pay a considerable part of the cost. It would seem that even now they cannot widen the whole road.

The local authority not having chosen to exercise that discretion, but having decided to retain a 24 ft. carriageway with two 8 ft. paths, the appeal committee have assumed the right to say: "As we, the appeal committee, think that a "20 ft. carriageway is all that the frontagers ought to be "asked to pay for, the works are unreasonable."

[LORD HEWART C.J. Not by reason of the works themselves, but because of the proposed incidence of the burden.]

Precisely, and they have sought to support that view by a dictum of Salter J. at the end of his judgment in *Chester Corporation* v. *Briggs* (1), a dictum which has given rise to very great controversy and difficulty. It is submitted now, as it was submitted in that case, that it is solely a question for the local authority whether they should pass any of the resolutions which that may pass for the purpose of varying the incidence of the burden, or of themselves making a contribution to the cost of making up a street. All that the justices are entitled to do is to say: "Taking that road which the local authority "have resolved to make up, are the works proposed to be "done reasonable in amount and in cost, quite apart from "who is to pay for them?" Parliament has entrusted to the local authority, and to the local authority alone, the power to vary by resolution the normal rule that the expense shall be apportioned among the frontagers according to their frontage. The matter was really dealt with in the judgments of Lord Hewart C.J. and Sankey J. in *Chester Corporation* v.

(1) [1924] 1 K. B. 239.

Briggs (1), where it is said: "They"—the justices—"had to "decide, in the absence of such a resolution, and having no "power indirectly to secure the effect of such a resolution, "whether the proposed works were unreasonable." In that case the justices had inserted, by way of purported amendment, a stipulation that the council should contribute 15 per cent. of the total cost, because they considered that in view of the contemplated use of the road as a relief road, it was unreasonable that the frontagers should bear the total cost.

[LORD HEWART C.J. That was manifestly wrong. They could not say by way of amendment what the resolution had purposely refrained from saying. But supposing they had said: "We cannot pass a resolution for you, but what we "can do is to consider whether this is reasonable in the absence "of that resolution," do you say that would be wrong ?]

Yes, it would be doing what your Lordship pointed out that they must not do, namely "*indirectly* to secure the effect "of such a resolution." It amounts to a decision by the justices on the question whether the work should be paid for by the frontagers or by some one else. In the present case the reasonableness of the works to be done was not challenged at all, nor the cost of them.

[HUMPHREYS J. The appeal committee seem to have found that the width of 24 ft. was necessary, though only because of the through traffic.]

That is, as I suppose they would say, for the purpose of persons other than the frontagers using the road. But always some part of the advantage of making up a street is for the general public.

[LORD HEWART C.J. The gist of *Chester Corporation* v. *Briggs* (2) which you have to grapple with is to be found, is it not, in the last few lines of the judgment of Salter J., where he says: "In considering an objection under s. 7 (*d*) that the "proposed works are unreasonable, the justices are entitled to "consider, among other things, whether the proposed works are "reasonable in the sense that it is reasonable that such work "should be done at the frontagers' expense"? I remember

(1) [1924] 1 K. B. 239, 245.

(2) Ibid. 239, 247.

the catastrophic effect produced by those words, when to the surprise of everybody, they were uttered.]

It is submitted that the judgment of Sankey J. puts the matter in the right light when he says (1): "Sect. 15 of the "Act, as it appears to me, gives a discretion to the urban "authority to decide whether they will contribute the whole "or any portion of the expenses of any private street works. "I do not think the justices have power by any decision to "embarrass or fetter the exercise of such discretion of the "urban authority or any power to compel such authority to "pass any resolution on the subject, or to pass a resolution "for them, as in effect they have purported to do in this "case." If that is right, it covers me in the present case. Salter J. himself said (2): "This is a statute which imposes "on individuals the cost of works which are partly for their "own benefit and partly for the benefit of others"—that, again, it is submitted, is a perfectly correct statement of the law and has always been followed; but he then went on in the words which your Lordship has read, which seem at variance with what has preceded them.

[LORD HEWART C.J. I may say frankly, as far as I myself am concerned—I cannot speak for Sankey J.—that when I heard those words I thought there ought to have been a dissenting judgment, not words like those, but it was too late. The words had been spoken.]

With respect, I think that is exactly the position. I read your Lordship's judgment as being in exact accord with the judgment of Sankey J.

[LORD HEWART C.J. I think that is true, and I myself, ever since 1923, have always regarded the closing words of Salter J.'s judgment as in the nature of a dissenting judgment from the other two members of the Court; but whether they are to be so regarded or not, they are there.]

The judgments of the majority in *Chester Corporation* v. *Briggs* (3) it is submitted govern this case. They are reinforced by the words of your Lordship's judgment in *Hornchurch*

(1) [1924] 1 K. B. 246.
(2) Ibid. 247.
(3) Ibid. 239.

Urban District Council v. *Webber* (1): "There is clear and "express authority on the point that if they"—that is, the local authority—"refrain from passing a resolution of that "kind, no Court can tell them that they must do so or behave "as if they had done so. I have no hesitation in expressing "the view myself that, although it is highly desirable that "administrative acts should not be permitted to encroach "on the field of judicial decision, it is impossible, on these "words in this section, to say that judicial decision can "operate to compel an administrative act to be done which "has not been done or to treat the matter as if it had been "done."

Trustram Eve K.C. and *Winfrey* for the appellants. Although we naturally rely on the last words of Salter J.'s judgment in *Chester Corporation* v. *Briggs* (2) it may not be necessary in this case to depend on them. The appeal committee's decision does not dictate, directly or indirectly, to the local authority. The position is that, if the decision of the appeal committee stands, the local authority must reconsider the matter. They have a number of alternatives to choose from. They may resolve to make up a 24 ft. road in a less expensive way, so that the burden on the frontagers does not exceed the cost of a 20 ft. road on the present specification. Or they may say: "On further consideration we think there is something to be "said for the view of the appeal committee, and that there is, "after all, a case for resolving to contribute part of the "expense." Or they may on reconsideration decide to pass a resolution under s. 35 of the Public Health Act, 1925, to vary the relative widths of the carriageway and footways. None of those things have they done yet. None of those things has quarter sessions suggested, much less insisted, that they should do. Or the local authority may say: "In view of the "opinion of the appeal committee we will postpone the whole "matter for a year or two." Any of those courses is open.

Sect. 35 of the Public Health Act, 1925, is really irrelevant to this case. The appeal committee has not said that the local authority should operate that section, nor that a 24 ft. road

(1) [1938] 1 K. B. 698, 711.

(2) [1924] 1 K. B. 239, 247.

is wrong. They have not said: "We think there should be a "20 ft. carriageway." What they have said is: "We think "the frontagers should only pay the equivalent of a 20 ft. "carriageway."

[LORD HEWART C.J. The effect of that would be to alter the incidence of the expense, would it not?]

Only if the local authority determine to adhere to the present specification. There are many ways in which they could modify it so as to save expense—by grass verges instead of pathways, for instance—and avoid paying anything. All that quarter sessions says is: "We do not think these works are reasonable "in the sense that they are reasonable in all the circumstances "of the case which we have heard." It is a finding of fact.

[LORD HEWART C.J. You said at the beginning of the argument that you accepted all the contentions of the respondent council as set out in the case. When you read those contentions in conjunction with the findings of the appeal committee, is not the effect this, that the appeal committee say: "We are not telling you what the width of "the carriageway should be. We are not telling you how the "cost should be distributed, but we are telling you that as "long as these works impose upon the frontagers an expense "greater than that of a 20 ft. carriageway, those works are "in our opinion unreasonable, and we will not permit them?" Is this not saying: "We will indirectly secure the result of a "resolution"—the very thing which this Court decided, in *Chester Corporation* v. *Briggs* (1), that they could not do?]

What resolution, with respect, is quarter sessions asking the local authority to pass? How can anybody say? It seems to have been assumed on the other side that it was a resolution under s. 35 of the Public Health Act, 1925, but the inference is the other way, that the appeal committee thought 24 ft. was right.

[HUMPHREYS J. Your own contention (4.) in the case looks as though it was an argument on s. 35.]

No, that was a reply to the respondents' contention that we were forcing them to pass a resolution under that section.

---

(1) [1924] 1 K. B. 239.

[HUMPHREYS J. But your contention (3.) puts the matter very shortly: It is unreasonable because it puts upon the frontagers the burden of works which the statute has put upon them.]

This is a case where the local authority had already passed a resolution under s. 10 of the Act to have regard to the greater or less degree of benefit to be derived from the works.

[LORD HEWART C.J. But that is still an apportionment as between frontagers, not as between frontagers on the one hand and the general body of ratepayers, or persons who might be expected to derive benefit from through traffic, on the other.]

The matter may be taken in steps. The appeal committee would clearly have jurisdiction to say: "These works are "unreasonable in the sense that they are premature; no "works at all are necessary." They would also have jurisdiction to say: "These works are 'insufficient.' Your specifica-"tion will wear out in a year or two and the burden of making "up the road will have to be borne again by the ratepayers." Then under s. 7 (*d*) they may quash the provisional apportionment because the works are "unreasonable." Unreasonable for what? For a "street," not for a county highway. In considering whether the expense is reasonable they may take into account the sort of street, the sort of houses which front it, and the sort of traffic which may be expected upon it, and say: "Having regard to all these circumstances, you are putting an "unreasonable burden on the frontagers."

So far our submission is based on the findings of quarter sessions, which we submit are findings of fact, independently of *Chester Corporation* v. *Briggs*. (1) The first finding of the justices in that case was that the works were necessary, and that the specification was correct. They did not object to the burden, but only to the incidence of the burden, which they purported to deal with by amending the resolution. The Court, when it decided that they could not amend, nevertheless sent the case back to the justices. But in view of their finding that the works were necessary, what was there left to go back, if they were not to consider reasonableness in the sense in which the appeal committee have considered it in this case? When Sankey J. says (1): "I do not for a moment think or say that "they would wish to do indirectly what they have no power "to do directly" is he not saying, in antithesis to the Lord Chief Justice, not that they cannot do it indirectly, but that they can do it, but that he hopes that they will not wish to do it? Taking that intimation from Sankey J. with the express dictum of Salter J., and the fact that the case was sent back, it is submitted that the effect of the decision was that the justices might regard the question whether it was reasonable that the work should be done at the frontagers' expense, but with an intimation from Sankey J. that he hopes they will not use that as a method of doing indirectly what the Court were unanimous in saying they could not do directly.

---

(1) [1924] 1 K. B. 239.

[LORD HEWART C.J. It was a polite way of saying that they could not possibly do it. I have not the slightest doubt that that is what he meant. In other words, he might have said that it would not be honest if they took that course.]

Montgomery K.C. in reply.

LORD HEWART C.J. [after reading the findings of fact in the case stated:] In that state of the facts certain contentions on the one side and on the other were raised, to which I must presently and, I hope, very briefly, refer; but before I do that it may be well to look once more at what is the foundation of the whole of this matter, that is, the provisions of the statute with regard to provisional apportionment. By s. 10 of the Private Street Works Act, 1892, it is provided: "In a provisional apportionment of expenses of private street works the "apportionment of expenses against the premises fronting, "adjoining, or abutting on the street or part of a street in "respect of which the expenses are to be incurred shall, unless "the urban authority otherwise resolve, be apportioned" in a certain way. That is the clearest possible direction. It is the laying down of a universal affirmative rule which can be departed from only if certain conditions are fulfilled. The rule,

(1) [1924] 1 K. B. 247.

the standard, the normal procedure is that the apportionment of expenses against the premises fronting, adjoining or abutting shall be made according to the frontage of the respective premises. But that general rule having been laid down, the section goes on to provide for certain possible variations which are optional. They are optional at the choice, that is to say within the discretion, of the urban authority themselves. Three of them are enumerated. It does not in the least follow that if one is adopted the others must also be adopted, or that any of the others must be adopted. The matter is left and, in my opinion, most deliberately left, within the discretion of the urban authority. The urban authority may, if they think just, resolve that in settling the apportionment regard may be had, and then follow considerations to which regard may be had, and the first which is named is : "The greater or less degree of benefit "to be derived by any premises from such works." Two other possible courses by way of supplement are also contemplated, but always at the discretion of the local authority. They do not arise in this case. They did arise in *Hornchurch U.D.C.* v. *Webber* (1) which was argued at some length before us a few weeks ago. So far as this case is concerned, the urban authority have been content, within the exercise of their undoubted discretion, to resolve merely that in settling the apportionment regard shall be had to "the greater or less degree "of benefit to be derived by any premises from such works."

That resolution having been made, it was contended on the part of the appellants in the court below that the proposed works were partly for the benefit of the frontagers and partly for the benefit of the general public. It was contended that a carriageway with a width of 24 ft. was necessary only because of through traffic, and that a carriageway with a width of 20 ft. would be sufficient for the local traffic. It was contended further that it would be unreasonable to throw upon the frontagers the burden of works which were partly for the benefit of others ; and yet again, in words perfectly free from any kind of ambiguity, it was contended in the court below that there was nothing in law which compelled the appeal committee of quarter sessions to dismiss an objection pursuant to s. 7 of the Private Street Works Act, 1892, if it were satisfied that the respondent council were endeavouring to throw upon the frontagers the cost of works which were partly for the benefit of the frontagers and partly for the benefit of others. In other words, the court of quarter sessions was, in the clearest possible terms, invited by the appellants to uphold the objection which had been taken, because the true view of the whole matter was that an attempt was being made to throw upon the frontagers the cost of work which, though it was partly for their benefit, was also partly for the benefit of others; and it was said that that endeavour was unreasonable and the appeal committee were induced to take and undoubtedly did take that view. Their finding is set out in perfectly clear terms in para. 10 of the case. They decided "that a 20 ft. carriage-"way was reasonably sufficient for the needs of the said "frontagers and to the extent that the said works would "impose upon the said frontagers an expense greater than that "of a 20 ft. carriageway such works were unreasonable." Taking that view, the appeal committee ordered that the appeals of the appellants be allowed with costs and that the resolution, plans and section, estimate and provisional apportionment should be quashed.

---

(1) [1938] 1 K. B. 698.

Now what was the contention on the other side? It is not without interest to observe that, as has appeared in the course of the argument, the contentions on the other side are not in substance disputed. They were these: That as the street had been laid out in accordance with the layout plans and the notice of intention to lay out the street, that is to say, with a 24 ft. carriageway and two 8 ft. paths, the respondent council were bound to take the street as they found it, unless they exercised their powers under s. 35 of the Public Health Act, 1925, and were entitled to make it up to the full width thereof. Secondly, it was contended "that the question of the variation of the "relative widths of the carriageway and footways in pursuance "of section 35 of the Public Health Act, 1925, was one for the "respondent council's discretion." Thirdly, it was contended "that the respondent council not having exercised the power "conferred on them by section 35 of the Public Health Act, 1925, "of requiring a variation of such relative widths, they could not "be compelled to require such variation." Finally, it was contended "that it was not competent for the appeal committee to "alter such relative widths or to hold the proposed works "unreasonable on the ground that they did not vary the "existing width of the carriageway."

Those contentions being admitted, what was left of the area of dispute? Within what limits did the dispute remain? I think the limits are perfectly plain. The statute provides quite clearly that, subject to certain named exceptions, a uniform normal standard of apportionment shall prevail. The expenses shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises. The only resolution by way of variation at which the urban authority in this case arrived was a resolution making an exception in favour of the consideration of "the greater or less degree of benefit to be derived by any "premises from such works." Therefore, the overriding principle prevails that, for the purpose of these expenses, the apportionment must be according to frontage. But that did not suit the appellants. They were not indeed prepared to make a frontal attack upon the resolution, or upon the policy, or upon the discretion of the Urban District Council, but by what I can only regard as a not very ingenious subterfuge they sought to get round the matter in another way. They said in effect, when one looks at their contentions: Now it may well be that the justices cannot prescribe a resolution to the urban authority. It may well be that the justices cannot usurp the discretion which the legislature has deliberately given to those who are the local representatives of the public, but the justices can behave in such a way as to render nugatory the course which the urban authority have taken, by reading into the alternatives contemplated and provided by the statute something entirely different. The justices, it was argued, in effect, may say: "True we cannot "depart from the major premise that expenses must be "apportioned according to the frontage of the premises, but if "your specification contemplates the provision of a carriageway "with this width in this place, we will say that you are "really endeavouring to throw upon the frontagers the cost "of works which were partly for the benefit of the frontagers "and partly for the benefit of others; and accordingly we "will take such steps as are suggested to our ingenuity to "vary the operation of this statutory rule, and we will in so "doing render what you have done of no effect." That seems to me to be the clear meaning of what was argued for, what was explained, and what was approved, and it seems to me to come exactly within the words which were used nearly fifteen years ago in this Court, in the case of *Chester Corporation* v. *Briggs* (1), where, if I may be excused for repeating my own words, I said this: "What then was the question for the "justices to decide? They had to decide, in the absence of "such a resolution"—that is a resolution under s. 15—"and having no power indirectly to secure the effect of such "a resolution, whether the proposed works were unreasonable." Here it is not contended that there should have been a resolution. It could not be contended that there should have been a resolution, because any such resolution as might have been suggested in such an argument would have been clearly outside the provisions of s. 10. The contention was slightly different; it was: Because no such resolution is contemplated, therefore—and not for any other reason—this apportionment of expenses must be pronounced to be bad, and it must be said that under the provisions of s. 7 of the Private Street Works Act, 1892, the proposed works are insufficient or unreasonable and the estimated expenses are excessive. In other words, it is boldly said—it was said below and with change of phrase it is said here—that it may be contended, and contended with success, that a coach and four is to be driven through the plain words of s. 10 of the Private Street Works Act, 1892, unless countenance is given to those who contend that, in a particular case, works shall be executed contrary to the wish of the local authority, and that in the absence of any resolution, the expense of works should

(1) [1924] 1 K. B. 239, 245.

be distributed in its burden between the frontagers and those who are not frontagers. The justices were asked to be satisfied, and were satisfied, that the respondent council was endeavouring to throw upon the frontagers the cost of works which were partly for the benefit of the frontagers and partly for the benefit of others.

The course which the argument has taken suggests that some misunderstanding as to the true scope and effect of the law laid down in *Chester Corporation* v. *Briggs* (1) has been caused by the dictum at the end of the judgment of Salter J.: "In considering an objection under s. 7 (*d*) that the proposed "works are unreasonable, the justices are entitled to consider, "among other things, whether the proposed works are "reasonable in the sense that it is reasonable that such work "should be done at the frontagers' expense." That dictum, if it implies that the discretion given to the local authority by the statute is in any way subject to revision or control by the justices, finds no support in the judgments of the other members of the Court, nor is any approval to be implied from silence, since they gave judgment before that dictum was pronounced, and with no knowledge that it was intended to be pronounced. For myself, I must regard the judgment of Salter J. as having been to that extent a dissenting judgment, with which I was, and still am, unable to agree. While the authority of the decision in *Chester Corporation* v. *Briggs* (1) remains unimpaired, it should henceforth be understood in my opinion that that dictum is not approved by this Court, and cannot be relied upon to justify what has been done by the appeal committee in the present case.

In my opinion, in those circumstances, the court of quarter sessions was misled into something wholly irrelevant, something which did not arise upon the facts of the case and a proper consideration of the law. They have decided, so far as they could, to impose upon the local authority a new method not contemplated by the statute; and without going further into these authorities, I have no doubt, speaking for myself, that this appeal ought to be allowed, and that the consequential results ought to follow. I have no doubt whatever that this decision to which the appeal committee was induced to come, ought to be reversed.

---

(1) [1924] 1 K. B. 239, 247.

Humphreys J. I am of the same opinion. I agree with my Lord that the law upon this matter is to be found entirely in the Private Street Works Act, 1892. It is, I think, s. 6 of that Act which, in the first place, provides in clear and unmistakable language upon whom is to fall the burden of paying the expenses of executing private street works. Sect. 6 provides: "The expenses incurred by the urban authority in "executing private street works shall be apportioned (subject "as in this Act mentioned) on the premises fronting, adjoining, "or abutting on such street or part of a street." That is the law. It is the law to-day. Sect. 10 provides for different methods to be adopted by those who have to prepare and make a provisional apportionment, but it is an apportionment on the frontagers, and in this case a provisional apportionment was made upon the frontagers in accordance with s. 6. In accordance with s. 10 of the Act, the apportionment was made according to the greater or less degree of benefit to be derived by any particular premises, that is, fronting premises, from such works. As my Lord has said, there is to be found in s. 10 a provision which has no applicability to this case, which enables the apportionment to be made, in particular circumstances, upon persons who are not the owners of premises actually fronting. Prima facie and for the purpose of this case, the expenses of making up this road are to be paid by the frontagers.

The question arose what road was necessary or reasonable, because in considering any objections to an apportionment the justices are to have regard to objections such as that the proposed works are unreasonable or that the estimated expenses are excessive. Those objections were made in this case; the justices heard them and they declined to give effect to them. Whereupon there was an appeal to quarter sessions and, on the face of it, the grounds of appeal appear to raise the same point as had been decided by the justices. But it is clear that whatever was argued before the appeal committee, which takes the place of the old quarter sessions in hearing appeals, the appellants there failed to satisfy the appeal committee that the proposed works were unreasonable. All that they could get and all that is to be found in the findings of fact stated by the appeal committee in this case is this, that a road with a carriageway of a width of 20 ft., as distinguished from a road which in this case was 24 ft., would be sufficient to meet the requirements of the frontagers to the road, a finding which might be of great importance if the road was one which was only to be of use to the frontagers. But the appeal committee find this further fact: "Betterton "Road"—the road in question—"is one of several roads which "connect the arterial road leading from Tilbury to London "with a road leading from Dagenham to Hornchurch, and "it is probable that as such connecting road, it will be used by "through traffic." The appeal committee must be taken to have been satisfied therefore that a 24 ft. road was not unreasonable, having regard to the use which in all probability would be made of this road.

The argument which is to be found in the contentions of the appellants is, first of all, that the proposed works in Betterton Road were partly for the benefit of the frontagers and partly for the benefit of the general public. There is no doubt that that is perfectly true. Roads are made partly for the benefit of frontagers and partly for the benefit of the general public. Secondly, they contend that a carriageway with a width of 24 ft. was necessary—they appear to admit that it was necessary—only because of the through traffic, and that a carriageway with a width of 20 ft. would be sufficient for the local traffic. Thirdly, and boldly, they contend that it would be unreasonable to throw upon the frontagers the burden of works which were in part for the benefit of others; and it was that contention which found favour with the appeal committee.

In my view, what the appeal committee have done here is to say this, and to say it quite plainly: "Because we dis-"approve of the Act of Parliament which has put upon the "frontagers and required to be put upon the frontagers the "whole expense of making up such a road as this, we decline "to give effect to it, and we shall say that that which we are "bound to say was necessary is nevertheless unreasonable "because by the Act of Parliament the expense of doing it falls "upon a particular class of person." I ask myself: By what right do quarter sessions take upon themselves the duty to make any such pronouncement at all? Whether it is reasonable or unreasonable that frontagers should be required to pay for the expense of making up a new road is a matter which they had no more right to consider than this Court has the right to consider. Parliament has declared that they shall. If it was thought by quarter sessions that authority for the course they took was to be found in the dictum of Salter J. in *Chester Corporation* v. *Briggs* (1) I need only say that I entirely agree with what my Lord has now said as to that dictum.

There was no attempt in this case, apparently, to say that the estimated expense of doing the works was excessive, which means that, assuming the work had to be done, the cost of it was not unreasonable or excessive. That being so, it appears to me that the case was unarguable. I regard it as a very plain case of that sort which comes, not for the first time, before this Court, where a body of justices, in this case forming the appeal committee, have endeavoured not to comply with and follow the Act of Parliament, but to evade it. I agree with my Lord in the judgment which he has pronounced.

MACNAGHTEN J. I respectfully agree with both the judgments which have been delivered and have nothing that I can usefully add.

Respondents' appeal allowed.

Solicitors for the respondent council: *Sharpe, Pritchard & Co.*

Solicitors for the appellants: *Yarde & Loader.*

J. W. H.

---

(1) [1924] 1 K. B. 239, 247.

In re THE UNEMPLOYMENT INSURANCE ACT, 1935, AND *In re* AN APPLICATION BY STEPHENS AND OTHERS.

1938
June 14.

Unemployment insurance—Employment on fox fur farm—Employment in agriculture—Unemployment Insurance Act, 1935 (25 *Geo.* 5, *c.* 8), *s.* 3, *Sch. I., Parts I., II.—Unemployment Insurance* (*Agriculture*) *Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 13), *s.* 1.

An employee was employed on a farm devoted to the breeding of silver foxes, nutria, etc., for their pelts. His duties consisted of feeding and watering the animals and of general employment on the farm, upon which was grown a substantial part of the food consumed by the animals. He was paid agricultural labourers' wages, and lived under conditions similar to theirs :—

Held, that the employee was employed in agriculture within the meaning of the Unemployment Insurance (Agriculture) Act, 1936.

Peterborough Royal Foxhound Show Society v. *Inland Revenue Commissioners* [1936] 2 K. B. 497, adopted and followed.

Inland Revenue Officer v. *Ardross Estates Co.* 1930 S. C. 487, not followed.

ISSUES referred to the Court by the Minister of Labour under s. 84, sub-s. 1 (*b*) of the Unemployment Insurance Act, 1935 (25 Geo. 5, c. 8).

In the first issue Kenneth Thomas Stephens and Raymond Hilton Branthwaite, of the Moresdale Hall Fur Farm, Grayrigg, near Kendal, Westmoreland, applied in writing to the Minister of Labour under s. 10, sub-s. 1, of the Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30) and/or s. 4, sub-s. 1, s. 12, sub-s. 1 and s. 74, sub-s. 1, of the Unemployment Insurance Act, 1935, for the determination of the question whether the employment of one E. Otway on the above farm was or was not employment in agriculture within the meaning of the Unemployment Insurance Act, 1935, and the Unemployment Insurance (Agriculture) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 13). The issues in the other cases raised the same point and need not be further referred to.

The following facts appear from particulars relied on by the Minister of Labour as supplemented by evidence given to the Court by Mr. Mackenzie, vice-president of the Silver

Fox Breeders' Association. At all material times the above-named Stephens and Branthwaite ("the employers") were engaged in the breeding and rearing of silver foxes, mink, nutria and rabbits, for their pelts, at the said farm. The farm occupied an area of 64 acres, 44 being woodland and 20 acres grass. One and a half acres woodland were used for the mink, 2 acres grass for the foxes, one half acre woodland for nutria, and a barn was occupied by rabbits. About 20 acres of grass were let for grazing and about 30 acres of woodland were used for depasturing stock (worn-out cattle and horses) awaiting slaughter for food for the foxes and mink. Buildings and enclosures included (*a*) a barn used to house 200 rabbits and for storage of hay; (*b*) loose boxes and stalls for the housing of the said stock; (*c*) a workshop with carpenter's benches in which pens, etc., for the animals were made and repaired; (*d*) twenty fox pens (40 ft. by 10 ft. by 6 ft.) and twelve fox pens (10 ft. by 5 ft. by 6 ft.) situate in the above-mentioned 2 acres enclosure for foxes; (*e*) one hundred and seventy-eight mink pens (6 ft. by 3 ft. by 2 ft. 9 ins.), and two enclosures for nutria.

Hay was cut on the fox enclosure and was used as food for the rabbits, but most of the hay used was purchased. Vegetables were grown in the kitchen garden primarily for use in the house, but a certain proportion was used as food for nutria and rabbits. The proportion of food purchased to the whole amount used was about 80 per cent., and this included meat, cereals, hay and vegetables.

The diet of the various animals was—foxes, raw meat 50 per cent., cereals 50 per cent.; mink, raw meat 75 per cent., cereals 25 per cent.; nutria, vegetables; and rabbits, hay and cereals.

From January 24, 1937, to August 15, 1937, Edwin Otway ("the employee") was continuously employed by the employers on the farm at a weekly wage of 1*l*. 10*s*. 0*d*. with the free use of a house. The ordinary daily work of the employee was, from 8 a.m. to 12 noon, preparing food for foxes and mink, feeding and watering foxes. From 1 p.m. to 5 p.m. general work in connection with the upkeep of the farm (e.g., by cutting a drain for drawing water from the land, but not including repairs to the motor truck hereinafter referred to). Feeding and watering occupied about one hour a day. In addition to such regular duties the employee might at any time be called upon to perform other duties, e.g., to drive a motor truck or to do any other incidental farm work. When driving the motor truck he might be away up to 2 or 3 hours at a time. At times this might not happen for several weeks, and at other times might happen once or twice in a week. Any repair work done by him was done, not as a skilled craftsman, but as a handyman.

In addition to the employee, one other person had been employed whose duties consisted of gardening for 50 per cent. of his time, domestic duties in connection with the personal needs of the employers for 2 or 3 hours daily, and for 2 hours daily feeding nutria and rabbits. During the whole of the employees' period of employment contributions were paid at the rates prescribed by the Unemployment Insurance (Agriculture) Act, 1936, s. 2, Sch. II. There are approximately 120 silver fox farms in Great Britain, of which 20 are in Scotland.

By an application in writing dated July 28, 1937, the employers applied to the Minister of Labour for the decision of the question whether the aforesaid employment of the employee Otway was employment in agriculture within the meaning of the Unemployment Insurance Act, 1935, and the Unemployment Insurance (Agriculture) Act, 1936, and whether the contributions in respect thereof were payable at the general rates prescribed by the Act of 1935, s. 8 and Sch. III., or at the agricultural rates prescribed by the Act of 1936 as above.

The applicants did not appear at the hearing, but by leave of the Court the above-mentioned Mr. Mackenzie intervened and was represented by counsel.

Arthian Davies for the Minister of Labour. On behalf of the Minister the Court is asked to lay down a general rule. It is submitted that the employment of Otway was employment in agriculture within the meaning of s. 1 of the Unemployment

Insurance (Agriculture) Act, 1936. The definition of "agriculture" in s. 16, sub-s. 1 of the Act of 1936, that it "includes horticulture and forestry" is not of much assistance. In the Oxford Dictionary agriculture is defined as "The "science and art of cultivating the soil; including the allied "pursuits of gathering in the crops and rearing live stock." In the Workmen's Compensation Act, 1900, s. 1, sub-s. 3, now repealed by s. 16, sub-s. 2 of the Workmen's Compensation Act, 1906, agriculture "includes horticulture, forestry, and "the use of land for any purpose of husbandry, inclusive of the "keeping or breeding of live stock, poultry, or bees . . ." which may be applicable by analogy. It may be said that in order to be included in "live stock" the animals must be farm animals in the ordinary sense, bred for food and natural to the soil. But in *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners* (1) Lawrence J., in rejecting that argument said "But such an interpretation would exclude many "animals which are bred in the ordinary course of agriculture "and shown throughout the country; for example, town and "van horses, hackneys, hunters, racehorses, most breeds of dogs, "and fur-bearing animals." In that case it was held that a society for the promotion of foxhound breeding was an agricultural society within s. 23, sub-s. 2 of the Finance Act, 1924, as being "established . . . [for] promoting the interests of ". . . live-stock breeding." Lawrence J. in that case clearly thought that fur-bearing animals were livestock. On the other hand in the Scottish case of *Inland Revenue Officer* v. *Ardross Estates Co.* (2) it was held that land and buildings devoted to the breeding and rearing of silver foxes for their pelts were not agricultural lands and heritages within the Rating and Valuation (Apportionment) Act, 1928, ss. 2, 9, sub-ss. 2, 11, apparently on the ground that they were not used for agricultural purposes, i.e., the production of the means of human subsistence, as was the piggery in *Inland Revenue Officer* v. *Assessor for Renfrewshire.* (3) The occupation by the applicants was the occupation of land, taxable under Sch. B to the Income

(1) [1936] 2 K. B. 497, 500.
(2) 1930 S. C. 487.
(3) 1930 S. C. 345.

Tax Acts, in view of the fact that it was used for exercising and to a substantial extent for feeding the foxes, etc.: *Commissioners of Inland Revenue* v. *Melross.* (1) The practice of breeding these foxes, etc., is increasing; it is animal husbandry. Otway was paid agricultural labourers' wages, and lived under similar conditions and it is submitted that he was employed in agriculture within the meaning of the Act of 1936.

Bavington Jones for Mr. Mackenzie, in the same interest. The relevant fact is the work actually done by Otway, and that was, generally, the growing of food for, as well as attending to, the animals. In *In re Prior* (2) Roche J. adopted a draft formula drawn up by the Minister of Labour and the Farmers' Union, which is as follows: "Persons are employed in agri-"culture and horticulture when employed upon any operations "done about the production, preparation, or transfer of the "products of farm or garden or orchard in the best saleable "condition to a first buyer . . ." Treating the applicants as buyers, that formula applies here.

BRANSON J. These cases come before me as issues to be decided pursuant to s. 84, sub-s. 1 (*b*) of the Unemployment Insurance Act, 1935. The question in each case is whether an employee who was employed, the one between January 24, 1937, and August 15, 1937, upon the Moresdale Hall Fur Farm, Grayrigg, near Kendal, and the other at Hurstmonceux, on the Bodle Fur Farm, between February 1, 1936, and November 30, 1937, was a person in insurable employment within the meaning of the Unemployment Insurance Acts, 1935 and 1936, and whether such employment was, or was not, an employment in agriculture within the meaning of the said Acts. The Minister, acting under s. 84, sub-s. 1 (*b*) of the Act of 1935, instead of deciding the question for himself, has referred it for the decision of this Court.

The matter is one which really falls to be decided more, I think, as a matter of first impression than in any other way. The definition in s. 16, sub-s. 1, of the Unemployment Insurance (Agriculture) Act, 1936, is singularly unhelpful, in that all

(1) 1935 S. C. 812.

(2) (1927) 43 Times L. R. 784, 785.

1938

The Unemployment Insurance Act, 1935, *In re*, and An Application by Stephens, *In re*.

Branson J.

that it does by way of a definition of the word " agriculture " is to say that that word " includes horticulture and forestry," so that one is left to put an interpretation upon the word unassisted by anything which the interpretation clause of the Act has to say about it. The question whether a certain exercise of activities is agricultural or not has arisen in a variety of cases, but I cannot myself feel that I get a great deal of help out of any of them, and they are not all reconcilable. For example, there is the case of *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners* (1) where, the question being whether the Peterborough Royal Foxhound Show Society, was an agricultural society within the meaning of s. 23, sub-s. 2, of the Finance Act, 1924, Lawrence J. decided that it was an agricultural society because he said (2) it came within the words a society " established for the purpose of promoting "the interests of . . . live stock breeding " ; in other words he held that the breeding of foxhounds was the breeding of live stock, and in dealing with the contention of the Crown that the words should be construed as referring only to animals whose use is an integral part of agriculture, horticulture or forestry, he said (2) " But such an interpretation would exclude many "animals which are bred in the ordinary course of agriculture "and shown throughout the country ; for example, town and "van horses, hackneys, hunters, racehorses, most breeds of dogs, "and fur-bearing animals." If that is the correct view, it is a finding that fur bearing animals can properly be regarded as live stock in an Act where the distinction is being drawn between what is an agricultural society and what is not. On the other hand, there is the Scottish case, *Inland Revenue Officer* v. *Ardross Estates Co.* (3) in which it was held that land and buildings devoted to the breeding and rearing of silver foxes for the sake of their pelts were not " agricultural "lands and heritages " within the meaning of s. 9, sub-s. 11, of the Rating and Valuation (Apportionment) Act, 1928. The ground on which that decision was arrived at would appear to be (4) that the Court came to the conclusion that one could not say that land was used for agricultural purposes because it was used for the breeding of animals, unless the animals which were being bred were such as are associated with an ordinary farm, namely, horses, cattle, sheep, goats, pigs and poultry. Lord Sands goes on to say (1): "Fish "hatcheries are not agricultural subjects, the rearing of "pheasants is not an agricultural use of the land, nor is the "breeding of dogs, however wide the outrun for exercise"; so he has taken exactly the opposite view to that which is taken by my brother Lawrence in the case of the *Peterborough Royal Foxhound Show Society* (2) to which I have already referred.

---

(1) [1936] 2 K. B. 497.
(2) Ibid. 500.
(3) 1930 S. C. 487.
(4) Ibid. 490.

Then there is another Scottish case, *Commissioners of Inland Revenue* v. *Melross* (3), where it was held that land which was used partly as a poultry farm, partly for breeding silver foxes, and mainly for the raising of the silver foxes for the sale of their fur, was land which could properly be assessed under Sch. B, and that the occupier should not be assessed upon the profits of the sale of the pelts under Sch. D. In that case it was pointed out that to a considerable extent, at all events, the foxes lived upon the land, in that they consumed grass, water-cress and other vegetables, some of which were grown upon the holding and, in addition, says Lord Fleming (4), "The cubs during their first three months are largely fed on "eggs which are obtained from the poultry run on the other "part of the holding." That being so, the Court came to the conclusion that the commissioners, who had found that the owner was properly assessable in respect of this adventure under Sch. B and not under Sch. D, were right.

That being the state of the authorities, it really comes, as I have said before, rather to a question of first impression than to anything else, and in my view the opinion of my brother Lawrence is preferable to that of the Court of Session in the *Ardross* case (5) because it seems to me that, in the first place, it is right to bear in mind sub-s. 2 of s. 4 of the Act of 1935, and to pay regard to the actual occupation of the people who are involved in this issue. They, it appears, are paid according to agricultural wages. They live the lives of agricultural workers. It is true that they are employed in feeding and watering and cleaning foxes, but unless it is to be said that agriculture is stereotyped and that no animal which has been introduced within the memory of man can properly be treated as the subject of agriculture in the sense that it is live stock which is raised upon a farm partly by the produce of the farm and partly by having the land to walk upon, I can see no distinction to be drawn between these foxes and sheep, which, of course, may be grown for mutton, or may be grown for their fleece, and I suppose one might imagine that some sheep may be grown rather for the one reason than for the other. I think it is impossible to say that no animal can be the subject of agriculture when it is being raised upon the land by the produce of the land, unless its flesh is used for human consumption, and that seems to me to be the only real way in which one could distinguish foxes, or mink, from other things such as pigs or cattle, which are undoubtedly live stock in the ordinary sense of the word, and the raising of which, and the feeding of which, and the tending of which, would obviously be regarded by everybody, so long as it is done in the ordinary way upon a farm, as an agricultural pursuit. I referred to the decision of my brother Lawrence. It is obvious from the passage to which I have already referred (1), that he drew no distinction between the raising of fur bearing animals and the raising of town and van horses, hackneys, hunters, racehorses, and most breeds of dogs.

---

(1) 1930 S. C. 490.
(2) [1936] 2 K. B. 497.
(3) 1935 S. C. 812.
(4) Ibid. 817.
(5) 1930 S. C. 487.

I do not think any good purpose will be served by going into any further refinement of argument about this matter. My view is that where one has as in these cases, a plot of land in the country being used for the raising of live stock in the shape of fur bearing animals, and at the same time being used to some not inconsiderable extent for the production of food for those animals, persons employed in relation to the feeding of those animals and in relation to the raising of food

(1) [1936] 2 K. B. 500.

for them are persons employed in agriculture and therefore entitled from the time at which the Act came into operation to be insured at the rates provided by the Act of 1936.

1938

THE UNEMPLOYMENT INSURANCE ACT, 1935, *In re*, AND AN APPLICATION BY STEPHENS, *In re*.

Solicitor for Ministry of Labour: *Solicitor to Ministry of Labour.*

Solicitors for Mr. Mackenzie: *A. W. Woolf & Co.*

W. L. L. B.

1938
April 11, 12;
June 22.

In re BARNES (DECEASED).

Revenue—Estate duty—Gifts inter vivos—Death occurring within three years of gifts—Insolvency of free estate—Assessment of value of gifts for estate duty—No allowance for debts—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1.

The deceased, within the period of three years before his death, made gifts to members of his family and friends of shares in a company of which he was the governing director, and also of freehold and leasehold property and cash, amounting in value to a total of 185,101*l.* At the time of his death his only property was certain wearing apparel, valued at 10*l.*, and two deferred shares and one ordinary share, each of the nominal value of 1*l.*, in the aforesaid company, and he owed debts amounting, together with the expenses of his funeral, to 90,390*l.* It was admitted that the gifts inter vivos were liable to estate duty, but it was claimed that, in determining the principal value of the property passing on the death of the deceased for the purpose of estate duty, all the property of the deceased must be aggregated to form one estate, and allowance made for the funeral expenses of the deceased and his debts and incumbrances, within the meaning of the Finance Act, 1894 (1):—

Held, that sub-s. 1 of s. 7 only contemplated allowance being made for liabilities of the estate which were met out of available assets of the estate, and the debts and funeral expenses of the deceased could not therefore be set off against the gifts inter vivos, which were not available for the purpose.

---

(1) Finance Act, 1894, s. 4: "For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated and form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof." Sect. 7: "(1.) In determining the value of an estate for the purpose of Estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest; nor (*b*) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained nor (*c*) more than once for the same debt or incumbrance charged upon different portions of the estate; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

1938

BARNES, *In re.*

PETITION (by way of appeal under s. 10 of the Finance Act, 1894) of Mrs. Edith Barnes, widow and sole executrix of the will of William Henry Barnes, deceased, against a decision of the Commissioners of Inland Revenue, that in determining the principal value for the purpose of estate duty payable on the property passing on the death of the said W. H. Barnes there should be no allowance made for the funeral expenses of the deceased or for any debts incurred by him.

The deceased was, at the time of his death, on September 2, 1931, the governing director of W. H. Barnes, Ld., pianoforte manufacturers, and the holder of one ordinary share of 1*l.* and two deferred shares of 1*l.* each in the capital of the said company. The company was incorporated as a private company under the Companies Act, 1929, on July 5, 1930, with a nominal capital of 200,000*l.*, divided into 200,000 shares of 1*l.* each, of which 40,000 were preferred shares, 159,998 ordinary shares, and two deferred shares. The cash for the whole of the shares was paid to the company by the deceased, who allotted the whole of the preference and ordinary shares to members of his family and others, retaining for himself only one ordinary share and the two deferred shares. By a clause in the articles of association of the company the deceased, so long as he held a deferred share, retained the controlling voting power of the company. The deceased also, within three years of his death, made gifts to his family and friends of certain freehold and leasehold property, and of cash. The value of the gifts inter vivos was agreed at 185,101*l.* 15*s.*

At the time of his death the only possessions of the deceased were certain wearing apparel, valued at 10*l.*, and two deferred shares and one ordinary share in W. H. Barnes, Ld., each of the nominal value of 1*l.*, and he owed debts amounting, together with his funeral expenses, to 90,390*l.* 4*s.* 1*d.*

In due course the petitioner, as sole executrix, lodged with the Commissioners an account of the property chargeable with estate duty on the death of the deceased, including the gifts inter vivos, and she claimed that for the purpose of determining the estate duty to be paid the said gifts inter vivos should be aggregated with all other property of the deceased to form one estate, and that deduction should be made therefrom of the funeral expenses and debts of the deceased, amounting to 90,390*l*. 4*s*. 1*d*. On that basis the appropriate rate of duty would be 19 per cent. and the duty 17,995*l*.

The Commissioners rejected the contention of the petitioner and claimed duty at the rate of 24 per cent. on the whole value of the gifts inter vivos, the amount claimed being 44,424*l*. 8*s*. 4*d*.

The petitioner appealed.

Sir William Jowitt K.C. (*Gurney Beagley* with him) for the petitioner. It is inconceivable that the Crown can claim more estate duty, by reason of the fact that these were gifts made before death, than they could have claimed had these been gifts made by the will of the deceased. That is what the Crown is seeking to do. If, by a fiction, the Crown brings into account these things which are in fact not part of the deceased's estate at all, the Crown cannot be placed in a better position than it would have been in if the assumption it makes were true. The Crown says that you cannot deduct a debt from an item of property which is not liable thereto. I grant that for the moment. Property passing at death, not subject to a settlement, is liable for debts. These gifts, for the purposes of estate duty, are deemed to be property passing at death. Therefore for the purposes of estate duty this property must be treated as though it were liable for debts; in other words, the Revenue cannot claim more duty than they would have been entitled to claim if the subject-matters of the gifts had remained in the hands of the deceased until his death. Sect. 7, sub-s. 1, of the Act of 1894 cannot apply to settled estate, because under that section allowances would have to be made for debts and incumbrances which never could apply to settled estate. The present case has to be decided just as if these gifts had never been made. The petitioner should pay that amount of duty (no more and no less) which would have been payable if the gifts had remained part of the deceased's estate and had actually passed at the time of his death. The debts would then have been deducted in arriving at the value.

Sir Donald Somervell A.-G. (*J. H. Stamp* with him) for the

Commissioners of Inland Revenue. The principle of aggregation laid down in s. 4 of the Act of 1894 leads to the process of valuing each item by itself, setting against its gross value the debts for which it is liable. The principle contended for by the petitioner would simply result in producing a valuation which is obviously incorrect. If, for instance, you have free estate valued at 5000*l.* and settled estate valued at 15,000*l.*, with debts amounting to 10,000*l.*, there remains a balance of 10,000*l.* Under the petitioner's contention the settled estate would only pay duty on 10,000*l.* If the debts amounted to 20,000*l.*, the settled estate would pay no duty. Debts for which a particular item of property is not and never can be liable are not to be taken into account in assessing the value. The mere injunction to aggregate property does not mean that you are not to proceed by the ordinary rational methods of calculation and ascertain what each item is worth before adding up the items. Under s. 7, sub-s. 1, no allowance is to be made in respect of debts which only attach to particular items of the estate.

Cur. adv. vult.

1938. June 22. LAWRENCE J. This is an appeal from a decision of the Commissioners of Inland Revenue to the effect that, in determining the principal value for the purposes of estate duty payable on the property passing on the death of William Henry Barnes, deceased, there shall be no allowance made for the funeral expenses of the deceased or for any debts incurred by him. During the year 1930 the deceased made gifts to his family to the value of 185,000*l.*, and on September 2, 1931, he died practically penniless, owing some 90,000*l.* His executrix, while admitting that his gifts must be subject to estate duty, contends that his debts must be deducted therefrom, notwithstanding that they cannot be paid. Sir William Jowitt, for the executrix, submitted that under the Finance Act, 1894, s. 2, property passing on death is deemed to include such gifts as those in question; that under s. 4 all property passing on death, including such gifts, shall be aggregated, so as to form one

1938

BARNES, *In re.*

Lawrence J.

estate; that, under s. 7, in determining the value of this aggregated estate allowance shall be made for debts; and that therefore allowance must be made in the present case for the debts in question. He further submitted that the last three lines of s. 7, sub-s. 1, must have been inserted to meet cases where assets of the estate had been specifically charged, and in general argued that as s. 2 brought into the estate assets which in fact formed no part of it, there was nothing unreasonable in making allowance for debts which will never be paid, and that the position of creditors is safeguarded by the Statute of Elizabeth, and is in any event no concern of the Revenue.

I am unable to agree with the construction of s. 7, sub-s. 1, contended for by the appellant. I think the words of the section contemplate liabilities of the estate which are met out of the estate, and I think that the last three lines of s. 7, sub-s. 1, in their natural meaning are inconsistent with the appellant's case. I do not see how, in determining the value of an estate, allowance can be made for debts beyond the value of the assets out of which the debts are to be met. It is an unnatural use of words, in my view, to speak of making an allowance for a minus quantity in determining value. The appeal will therefore be dismissed, with costs.

Solicitors for the petitioner: *W. R. Millar & Sons.*

Solicitor for the Commissioners: *Solicitor of Inland Revenue.*

A. W. G.

EXECUTORS OF W. S. COTTINGHAM (DECEASED) *v.* COMMISSIONERS OF INLAND REVENUE.

1938
June 30;
July 1, 5.

Revenue—Sur-tax—Avoidance of liability to taxation—Transfers of assets and associated operations—Whether effected "mainly for "some purpose other than the purpose of avoiding taxation"—Liability of executors to assessment—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18, *sub-ss.* 1 *and* 7; *Sch. II., para.* 4—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules, r.* 18.

The deceased, a Canadian by birth and domicil, who had been for some years before his death resident in the United Kingdom, became, apart from occasional lucid intervals, incapable of managing his own affairs. In 1933, with a view to protecting his property against dissipation by himself, the deceased executed a settlement under which he would be unable to deal with his assets in any way. No question of taxation was considered or discussed at that time, but subsequently, and admittedly for the purpose of avoiding United Kingdom taxation, the assets of the deceased, consisting of shares in an English company, were sold to a Canadian company (expressly formed for the purpose) in return for shares and non-interest bearing debentures in the Canadian company. The whole of these shares and debentures were by further settlements transferred to the trustees of the original settlement. The deceased died in January, 1936. It was held by the Income Tax Commissioners that the transfer of the shares in the English company to the Canadian company was made for the main purpose of avoiding taxation, within the meaning of s. 18 of the Finance Act, 1936, and therefore the executors of the deceased were liable to be assessed to sur-tax on the estimated amount of the deceased's income for the year 1935–36. The executors appealed, contending that in order to arrive at the main purpose of the transactions the Court must look at the " transfer and any associated operations " as a whole, and that the transfer of the assets was merely part of the machinery by which the main purpose of protecting the property was effected :—

Held, that on the true construction of s. 18, sub-s. 1, of the Act of 1936 (1) it was necessary for the taxpayer, in order to escape liability to tax, to show that both the transfer and any

---

(1) Finance Act, 1936, s. 18, sub-s. 1: "For the purpose of "preventing the avoiding by individuals ordinarily resident in the "United Kingdom of liability to "income tax by means of transfers "of assets by virtue or in consequence whereof, either alone or "in conjunction with associated "operations, income becomes payable to persons resident or "domiciled out of the United "Kingdom, it is hereby enacted "as follows :—

"(1.) Where such an individual has by means of any such "transfer, either alone or in "conjunction with associated "operations, acquired any "rights by virtue of which he associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation, and that on the admitted facts the finding of the Commissioners was right and the appeal must be dismissed.

Held, further, that para. 4 of the Second Schedule of the Act of 1936 incorporated all the provisions of the Income Tax Acts as to assessments, that by sub-s. 7 of s. 18 (1) the Act of 1936 was made retroactive as to liability to sur-tax, and that therefore under General Rule 18 of the Income Tax Act, 1918 (2), the assessment was rightly made on the executors of the deceased.

APPEAL (by way of Case stated under the Finance Act, 1936, s. 18; the Finance Act, 1927, s. 42, sub-s. 7; and the Income Tax Act, 1918, s. 149) from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, with respect to an assessment to sur-tax in the sum of

"has, within the meaning of "this section, power to enjoy, "whether forthwith or in the "future, any income of a person "resident or domiciled out of "the United Kingdom which, "if it were income of that individual received by him in the "United Kingdom, would be "chargeable to income tax by "deduction or otherwise, that "income shall, whether it would "or would not have been chargeable to income tax apart from "the provisions of this section, "be deemed to be income of that "individual for the purposes of "the Income Tax Acts:

"Provided that this subsection "shall not apply if the individual "shows in writing or otherwise "to the satisfaction of the Special "Commissioners that the transfer "and any associated operations "were effected mainly for some "purpose other than the purpose "of avoiding liability to taxation."

(1) Sub-s. 7: "The provisions of "this section shall apply for the "purposes of assessment to income "tax for the year 1935–36 and "subsequent years, and shall "apply in relation to transfers of "assets and associated operations "whether carried out before or after "the commencement of this Act:

"Provided that, for the year "1935–36, no income shall be "charged to tax at the standard "rate by virtue of the provisions "of this section, but surtax shall "be assessed and charged as if any "income which would, but for "this proviso, have been charged "as aforesaid had in fact been so "charged."

(2) Income Tax Act, 1918, General Rule 18: "Where any "person dies without having "delivered a statement of all his "profits or gains chargeable to "tax with a view to an assessment "thereon in due course, an assessment in respect of the profits or "gains which arose or accrued to "him before his death may be "made at any time within the "year of assessment, or within "three years after the expiration "thereof, upon his executors or "administrators, and the amount "of the tax thereon shall be a debt "due from and payable out of his "estate."

50,308*l.* for the year ending April 5, 1936, made upon the executors of Walter Sherwin Cottingham, deceased.

The material portions of the stated Case were as follow :—

As regards the sum of 10,308*l.*, part of the assessment under appeal, no dispute arises, as it is in accordance with the return made by the appellants for sur-tax purposes.

The appeal relates to the sum of 40,000*l.*, which is an estimate, made under para. 7 of the Second Schedule of the Finance Act, 1936, of the amount of income which the Commissioners of Inland Revenue contend is, by virtue of the provisions of s. 18 of the Finance Act, 1936, to be deemed to be the income of the late Walter Sherwin Cottingham (hereinafter called " the deceased ") for the period April 6, 1935, to January 22, 1936, on which date the said Walter Sherwin Cottingham died.

The deceased was a Canadian by birth and domicil, and he never abandoned his domicil of origin.

For some years before his death on January 22, 1936, he had resided in the United Kingdom. On the death of his father (in 1930) the deceased became entitled to a share of his father's estate, which was considerable, and included both English and foreign property.

By a deed of partition dated September 19, 1934, the deceased took as his share of his father's property an estate called Woolley Hall, Maidenhead Thicket, Berkshire, and 205,000 fully paid ordinary shares of 1*l.* each in Lewis Berger & Sons, Ld., a public company registered in England. Prior to that deed the deceased's share of his father's estate had not been defined.

The deceased was first married in 1921. This marriage was dissolved in 1931. Shortly afterwards the deceased married a second time, his wife being Mrs. Vera Cottingham, one of the present appellants. At about this time the deceased was drinking heavily, and, apart from occasional lucid intervals, was incapable of managing his own affairs. In or about April, 1933, the deceased consulted his solicitor, Mr. Ernest Simmons, with a view to protecting his property against himself. In August, 1933, Mr. J. A. Wolfe, a member of the

Chancery Bar, was instructed to draft a settlement under which the deceased would be unable to deal with his assets in any way. No question of taxation was considered or discussed at that time. On December 1, 1933, Mr. Wolfe's draft settlement was finally prepared. On December 7, 1933, Mrs. Vera Cottingham showed the draft settlement to Mr. T. H. Till, a chartered accountant, who suggested that a saving of income tax could be obtained by the formation of a foreign company, to which the deceased's assets should be transferred. On December 8, 1933, a further conference took place, at which Mr. Simmons, Mrs. Vera Cottingham, Mr. Wolfe and Mr. Till were present. At this conference it was decided to form a foreign company, and Mr. Simmons and Mr. Wolfe went to Paris, with the object of consulting a Swiss lawyer as to the formation of a Swiss company. On the journey to Paris Mr. Wolfe suggested a plan of creating non-interest-bearing redeemable debentures whereby a saving of estate duty could be effected. It was later decided to form a Canadian company, and not a Swiss company, for the reason that the expense would be less. A Canadian company, Orwell Investments, Ld., was registered on December 27, 1933. In January, 1934, negotiations were proceeding between the deceased and Orwell Investments, Ld., for the sale to Orwell Investments, Ld., of the deceased's share in his father's estate for shares and debentures in Orwell Investments, Ld.

When the deceased's share in his father's estate was settled by deed of partition, dated September 19, 1934, 195,000 ordinary shares of Lewis Berger & Sons, Ld., were sold by the deceased to Orwell Investments, Ld., for :—

(*a*) the issue and allotment to the deceased or his nominees of 10,000 class B shares of five dollars each of Orwell Investments, Ld., and

(*b*) the issue and allotment to the deceased or his nominees of 1800 non-interest-bearing redeemable debentures of 1000 dollars each of Orwell Investments, Ld.

The said 1800 non-interest-bearing debentures were made redeemable to the extent of 100,000 dollars in any one year in the deceased's lifetime at a premium of 12½ per cent.

By a settlement dated February 16, 1934, the deceased covenanted to transfer to trustees upon the trusts of the settlement all the said class B shares of Orwell Investments, Ld., when the said shares were allotted to him.

By another settlement of the same date the deceased covenanted to transfer to trustees upon the trusts of the settlement all the said non-interest-bearing debentures of Orwell Investments, Ld., when such debentures were allotted to him.

The trustees of both settlements were persons residing in the United Kingdom.

During the year ending March 31, 1936, 23,033*l.* 14*s.* 2*d.* was paid by Orwell Investments, Ld., to Mr. E. Simmons, one of the trustees of the debenture settlement of February 16, 1934, in redemption of the debentures of Orwell Investments, Ld. Debentures to the amount of 101,000 dollars were redeemed at a premium of 12½ per cent. Of the sum of 23,033*l.* 14*s.* 2*d.*, 23,030*l.* was distributed by the trustees of the said debenture settlement and paid to the joint account of the deceased and Mrs. Vera Cottingham.

For the year ending April 5, 1936, no dividend was paid by Orwell Investments, Ld., in respect of class B shares of Orwell Investments, Ld., and the trustees of the share settlement of February 16, 1934, received no income during the year ending April 5, 1936.

It was contended (inter alia) on behalf of the appellants :—

That there was no provision in the law under which any assessment could be made upon the executors ;

That the transfers of assets and the operations associated therewith were effected mainly for some purpose other than the purpose of avoiding liability to taxation, and s. 18 of the Act of 1936 did not apply to them ; and

That the assessment should be reduced to 10,308*l.* in accordance with the return made by the appellants for sur-tax purposes.

It was contended (inter alia) on behalf of the Crown :—

That the transfer of the said shares of Lewis Berger & Sons, Ld., to Orwell Investments, Ld., was made with the main purpose of avoiding taxation ;

1938

Cottingham's Executors v. Inland Revenue Commissioners.

That the transfer of assets to Orwell Investments, Ld., afforded no protection to the deceased and was unnecessary except for the purpose of avoiding taxation ; and

That the assessment upon the executors of Walter Sherwin Cottingham, deceased, was good in law.

The Commissioners, having considered the evidence and arguments adduced before them, found that the transfer of the said Lewis Berger & Sons, Ld., shares to Orwell Investments, Ld., was made with the purpose of avoiding taxation. They held that the assessment under appeal was sustainable in law, and they confirmed the said assessment in principle.

The Commissioners subsequently reduced the total assessment from 50,308*l.* to 38,454*l.*

Needham K.C. and *Heyworth Talbot* for the appellants. As a matter of grammar and construction, resulting from a review of the section as a whole, the two things—the transfer and the associated operations—must be looked at together. You do not get the motive of a series of transactions by looking at only one of them. You have to ask yourself whether these particular things were effected "mainly" for some purpose other than tax avoidance. The three operations which are bound together in this case are the operations regarded in the section as being "the transfer and the associated operations." There cannot be two views as to why the settlement, as a settlement, was made. It was for the purpose of taking this property away from the dominance of Mr. Cottingham and putting it under the dominance of trustees. In the course of carrying out that main purpose of preserving the property another purpose was, so to speak, embodied. Because, in carrying out that main purpose there is embodied a scheme which is redolent of tax avoidance it does not follow that tax avoidance is the main purpose. In fact it is merely part of the machinery by which the main purpose is achieved. There is no evidence on which the Court can decide that the operations as a whole were effected mainly for the avoidance of taxation. Moreover, the assessment in this case is not properly made upon the executors. Rule 18 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, is not applicable, because the deceased, at the time of his death, was not chargeable to tax, the Finance Act of 1936 only having been passed on July 16, 1936, while Mr. Cottingham died on January 22 of that year.

Sir Donald Somervell A.-G. (*J. H. Stamp* and *Reginald Hills* with him). The purpose of protecting the late Mr. Cottingham from dissipating his estate could and would have been achieved without the transference of the assets to a person domiciled outside the United Kingdom. The argument of the appellants involves this proposition, that although the sole purpose of the transfer of the assets abroad was avoidance of taxation, s. 18 does not apply if the associated operations had some other purpose. That argument substantially substitutes "or" for "and," because it contends that if the individual can show that either the transfer or the associated operations were effected mainly for some purpose other than tax avoidance then he gets off. In effect the appellants are saying that it is sufficient for the taxpayer to prove that one of the two categories to which the Commissioners have to direct their minds is effected for some purpose other than tax avoidance. The Crown says that the taxpayer has to show that both the transfer and the associated operations were effected for some purpose other than tax avoidance. The mischief against which s. 18 is primarily directed is the transference of assets under which the income becomes payable to persons resident outside the United Kingdom. If, therefore, it is found that the transfer was effected for the purpose of avoiding taxation, that concludes the matter. It is then unnecessary to consider the purpose of the associated operations. They are brought in merely to prevent the purpose of the section from being evaded. The assessment is properly made on the executors. All the provisions of the Income Tax Acts as to assessment are incorporated by para. 4 of the Second Schedule of the Finance Act, 1936, and by sub-s. 7 of s. 18 the Act is made retroactive as to liability to sur-tax.

Cur. adv. vult.

1938. July 5. LAWRENCE J. This is an appeal by the executors of Mr. Walter Sherwin Cottingham against a decision of the Special Commissioners. Mr. Cottingham was a domiciled Canadian, ordinarily resident in this country. The appeal relates to a sum of 40,000*l.*, which is an estimate, made under para. 7 of the Second Schedule of the Finance Act, 1936, of the amount of income which the Commissioners of Inland Revenue contend is, by virtue of the provisions of s. 18 of the Finance Act, 1936, to be deemed to be the income of Mr. Cottingham for the period from April 6, 1935, to January 22, 1936, on which date Mr. Cottingham died.

The questions raised by the case are two main questions, first of all as to the true construction of s. 18 of the Finance Act, 1936, and particularly the proviso to sub-s. 1, and, secondly, whether an assessment could be made on executors in the circumstances of this case.

It is not necessary for me to recapitulate the facts exactly in this case ; they are set out in the stated Case. It is common ground that the transfer of assets, which was made by Mr. Cottingham to a Canadian company, was made for the sole purpose of avoiding taxation. It is equally common ground that the settlements which were made with reference to the assets so transferred, were made for the sole purpose of preventing Mr. Cottingham from having the control over his estate, and the question of construction which arises on the proviso to sub-s. 1 of s. 18 of the Finance Act of 1936 is whether, under that proviso, it is necessary for the individual referred to to show that the " transfer and any associated "operations," regarded together as one transaction, " were "effected mainly for some purpose other than the purpose of "avoiding liability to taxation," or whether it is necessary for the individual to show that the transfer was effected mainly for some purpose other than the purpose of avoiding taxation, and that any associated operations were effected for some such purpose.

It was submitted by the Crown, for the Commissioners, that it was necessary for the taxpayer to show that both the transfer of assets and the associated operations were effected for purposes other than the avoidance of taxation, and the Commissioners adopted that view, and found against the taxpayer on the admitted fact that the transfer of assets was not made for any purpose other than the avoidance of taxation.

It is contended on behalf of the appellants that that is not the true construction of the proviso, and that what the Special Commissioners ought to have considered was, what was the main purpose of the transfer of assets and any associated operations, looked at together; and it is contended that, if they had had regard to that question, they ought to have come to a different conclusion, and to have come to the conclusion that the main purpose was some purpose other than the avoidance of taxation. It was at one part of the argument contended that there was no evidence upon which they could have come to any conclusion except that the main purpose was some purpose other than the avoidance of taxation; but that contention was, I think, abandoned, and it was agreed on behalf of the appellants that the case, if they are right on the construction of the proviso, ought to go back to the Commissioners.

I am of opinion that the construction put upon the proviso by the Commissioners and contended for by the Crown is the right construction. The section, in its earlier part, refers to the transfer of assets, either alone or in conjunction with associated operations, thus referring to the concept of the transfer and associated operations together; but in the proviso different words are used—namely, "the "transfer and any associated operations." Moreover, the proviso is expressed in the affirmative: the individual must show that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding taxation. These words are, in my opinion, capable of meaning that both the transfer and the associated operations were effected mainly for some purpose other than avoiding taxation, and in view of the avowed purpose of the section, of the contrast between the words of the proviso and the words used earlier in the section, of the wide definition in sub-s. 2

of associated operations, and of the difficulty of deciding what is the main purpose of such diverse transactions, I am of opinion that this is the true interpretation.

As to the second question, whether an assessment can be made, in the circumstances of this case, on the executors, it is necessary first of all to refer to the Second Schedule of the Act of 1936, para. 4, which provides that "All the provisions of the "Income Tax Acts relating to the charge, assessment, collec-"tion and recovery of income tax, to appeals against assess-"ments made by the Special Commissioners and to cases "to be stated for the opinion of the High Court, shall apply "to any income tax chargeable by virtue of the principal "section, so far as they are applicable and subject to any "necessary modifications." That paragraph incorporates all the provisions of the Income Tax Acts as to assessment. By s. 18, sub-s. 7, of the Finance Act, 1936, it is provided that "The provisions of this section"—that is the section in question—"shall apply for the purposes of assessment to income "tax for the year 1935-36 and subsequent years, and shall "apply in relation to transfers of assets and associated opera-"tions whether carried out before or after the commencement "of this Act: Provided that for the year 1935–36, no income "shall be charged to tax at the standard rate by virtue of the "provisions of this section, but surtax shall be assessed and "charged as if any income which would, but for this proviso, "have been charged as aforesaid had in fact been so charged." Therefore, for the year 1935–36, this Act, which came into force on July 16, 1936, was passed with retroactive effect for the year 1935–36, so as to impose sur-tax for that year.

By r. 18 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, it is provided that "Where any "person dies without having delivered a statement of all his "profits or gains chargeable to tax with a view to an assess-"ment thereon in due course, an assessment in respect of the "profits or gains which arose or accrued to him before his "death may be made at any time within the year of assess-"ment, or within three years after the expiration thereof, "upon his executors or administrators, and the amount of the tax "thereon shall be a debt due from and payable out of his estate."

Under that r. 18 the assessment in question has been made upon the executors of Mr. Cottingham for the period from April 5, 1935, up to January 22, 1936, the date of his death, in respect of sur-tax. The argument which is presented on behalf of the executors is that r. 18 is not applicable, because it is said that Mr. Cottingham when he died was not chargeable to tax, the Act of 1936 only having been passed on July 16, 1936, and Mr. Cottingham having died on January 22, 1936. In my opinion, that argument is unsound. I do not think that r. 18 has any reference to a default on the part of the person who has died, and it cannot be said, in my opinion, that Mr. Cottingham has delivered "a statement of "all his profits or gains chargeable to tax." The Finance Act of 1936, by its retroactive effect, has made the profits which accrued to Mr. Cottingham from April 5, 1935, to January 22, 1936, chargeable to sur-tax, and he died without having delivered a statement of such profits. Therefore, in my opinion, his executors are assessable in accordance with the provisions of General Rule 18.

Reliance was placed by the appellants upon s. 31, sub-s. 2, of the Finance Act, 1926, s. 45, sub-s. 6, of the Act of 1927, and s. 15, sub-s. 4, of the Act of 1930, where different words are used for the purpose of imposing a liability to assessment upon executors; but, in my opinion, the fact that different words were used in those sections was not meant to affect, and does not affect, the true interpretation of the words of General Rule 18, which are, in my opinion, what I have stated.

I therefore hold that the assessment was properly made in this case upon the executors of Mr. Cottingham, and the appeal will be dismissed, with costs.

Solicitors for the appellants: *Herbert Smith & Co.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

A. W. G.

C. A.
1938
March 8, 9;
April 12.

SMITH *v.* CAMMELL, LAIRD AND COMPANY, LIMITED.

[1936. S. No. 1325.]

Factory—Shipbuilder's yard, including dock—Newly-built ship undergoing completion in dock—Staging in forehold erected by shipbuilder in course of his work—Insulation company employed by shipowner afterwards allowed by shipbuilder to use staging for their work—Defect in staging—Accident to workman employed by insulation company—Staging constituting a factory—Occupier of factory, whether shipbuilder or insulation company—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 82, 104, *sub-s.* 1 (*iii.*); 149, *sub-ss.* 1, 2; 151, *Sixth Schedule, Part II.* (25.)—*Shipbuilding Regulations,* 1931, *Part II., reg.* 11 (*b*).

The Factory and Workshop Act, 1901, s. 104, provides (inter alia) that the provisions of the Act with respect to regulations for dangerous trades shall have effect as if " every dock . . . . were " included in the word 'factory,' " and that for the purpose of the enforcement of those provisions " the person having the " actual use or occupation of a dock . . . . or of any premises " within the same or forming part thereof . . . . shall be deemed " to be the occupier of a factory "; and under s. 149 and Sixth Schedule, Part II. (25.), a shipbuilding yard is a factory.

The Shipbuilding Regulations, 1931, made under s. 79 of that Act in respect of the construction and repair of ships in shipbuilding yards provide that it shall be the duty of the occupier to comply with the Regulations, and by Part II., reg. 11 (*b*), that all staging shall be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed.

The defendants were constructing in their shipbuilding yard a vessel for shipowners, which had been launched and placed for finishing in a wet dock in that yard. For the purposes of their building operations the defendants had erected in the lower forehold of the vessel a staging, which they no longer used, though their inspectors still examined it from time to time. The shipowners employed an insulation company to do certain work in the vessel, and the defendants allowed that company to occupy and use the staging in the course of their work. Owing to a defect in the staging, the plaintiff, an employee of the insulation company, while engaged in their work fell from the staging and was injured.

The plaintiff brought an action against the defendants for damages for personal injuries alleged to have been caused by the negligence of the defendants, and by their breach of the statutory duty imposed upon them by the Regulations:—

Held, by the Court of Appeal (Greer and Clauson L.JJ., Slesser L.J. dissenting), that the Regulations, as regards their provisions for the security of staging, did not so affect s. 104 of the Act as for the purposes of the case to render the shipbuilding yard the only possible factory and the shipbuilders the only occupiers, or necessarily to prevent premises forming part thereof from becoming a factory and the occupier of such premises from being the occupier of a factory; that the part of the vessel in which the staging was erected constituted a factory within the meaning of the Act and the Regulations, the occupiers of which were not the defendants but the insulation company; that the defendants were under no duty to maintain the staging; and that the action failed and should be dismissed.

Burtell v. *W. Gray & Co.* [1902] 1 K. B. 225; *Weavings* v. *Kirk & Randall* [1904] 1 K. B. 213; *Houlder Line* v. *Griffin* [1905] A. C. 220; *Burdon* v. *Gregson & Co.* [1906] 2 K. B. 275, 283; *Mackey* v. *James Henry Monks (Preston), Ld.* [1918] A. C. 59, considered.

The Tasmania (1890) 15 App. Cas. 223, 225, observations applied.

Judgment of Goddard J. affirmed.

APPEAL from the judgment of Goddard J. in an action tried by him without a jury at Liverpool Assizes.

Messrs. Cammell, Laird & Co. (hereinafter called "the defendants") were shipbuilders carrying on business in their shipbuilding yard at Birkenhead in Cheshire and elsewhere.

The defendants were constructing for but had not yet delivered to the Blue Star Line a vessel called or intended to be called the *Dunedin Star*, which had been launched and placed for finishing in a wet dock in that yard.

For the purposes of their work the defendants had erected a staging in the lower forehold of the vessel.

The work of finishing the vessel was being done partly by the defendants and partly by other firms employed by the Blue Star Line.

Among these other firms was the Cork Insulation Co., whose work consisted in the construction of insulation chambers in the vessel insulated by means of powdered cork, and the defendants, who were no longer using the staging themselves, permitted that company to make use of it for the purposes of their work.

The Cork Insulation Co. employed Mr. F. W. Smith (hereinafter called "the plaintiff"), a joiner, to do certain of the work undertaken by them which had to be done from the staging.

SMITH
v.
CAMMELL,
LAIRD
& Co.

On November 6, 1935, owing to a defect in the staging, the plaintiff fell from it into the hold of the vessel and sustained serious injuries.

On June 6, 1936, the plaintiff brought the present action against the defendants ; and he alleged in his statement of claim (para. 1) that at all material times the defendants were the owners and/or in occupation of the *Dunedin Star*, then undergoing construction by them in their shipbuilding yard ; (para. 2) that on November 6, 1935, the plaintiff was upon the *Dunedin Star* in the shipbuilding yard upon business in which he and the defendants had a common interest when owing to the negligence of the defendants their servants or agents and to their breach of the duties imposed upon them by the Shipbuilding Regulations, 1931, the staging upon which the plaintiff was walking gave way and he fell from the same: the Particulars of the defendants' alleged negligence and breach of duty being that they failed to construct the staging which they provided for use by the plaintiff securely or of sound and substantial material as required by reg. 11 (*b*) (i.) thereof, that they failed to maintain the staging in such a condition as to ensure the safety of all persons employed including the plaintiff as required by the same regulation, that they failed to have the staging inspected as required by reg. 11 (*b*) (ii.) thereof, that they failed to secure or fasten the planks forming the stage in such a manner as to prevent their slipping as required by reg. 13 thereof, that they provided a stage or platform for use by the plaintiff which was insecure and dangerous and a trap to the plaintiff, and that they failed to warn the plaintiff of the insecurity and danger of the stage or platform: And that by reason of the premises the plaintiff sustained serious personal injuries and suffered great pain and was put to expense and incurred loss and damage.

The defendants in their defence stated : (para. 1) that they did not admit any of the facts alleged in the statement of claim ; (para. 2) that they denied that the plaintiff was upon the *Dunedin Star* upon business in which he and the defendants had a common interest ; (para. 3) that the defendants denied all the allegations of negligence in the statement of claim; (para. 4) that at the material time the *Dunedin Star* was in a wet basin and the defendants denied that the Shipbuilding Regulations, 1931, were applicable to any work which was then being done in the ship; (para. 5) that if the said Regulations were applicable (which was denied) the defendants denied all the allegations of breaches thereof in the statement of claim; (para. 6) that if the plaintiff sustained the alleged or any injuries or damage (which was not admitted) such injuries and damage were solely caused by or alternatively contributed to by the plaintiff's own negligence and/or if the said Regulations applied (which was denied) by the plaintiff's own breaches of statutory duty: the Particulars of such negligence and breaches of statutory duty being that the plaintiff used a skip for moving cork along the said staging that to his knowledge was unsuitable for that purpose and/or likely to make the staging insecure by reason of the fact that it was too heavy and/or had a stiffener projecting on the outside; moved out of position the planks forming part of the staging; and failed to report the unsuitability of the skip for the purpose for which it was being used and/or the fact that it was likely to make the staging insecure.

On April 19 and 20, 1937, the action was tried at Liverpool Assizes by Goddard J. without a jury.

Evidence was given on behalf of the plaintiff and of the defendants respectively in support of their respective allegations of fact.

On April 20, 1937, Goddard J. delivered the following judgment, from which the effect of the evidence, and the findings of fact based thereon, sufficiently appear:—

GODDARD J. My judgment is that the action is misconceived. It is an action for personal injuries brought by the plaintiff, F. W. Smith, who was in the employ of the Cork Insulation Co., against Messrs. Cammell, Laird & Co., Ld., who were building a ship for the Blue Star Line. The contract between Cammell, Laird & Co. and the Blue Star Line did not include the doing by the former company of any part of the work

C. A.
1938

Smith
v.
Cammell,
Laird
& Co.

Goddard J.

of insulating the ship, that work being done by the Cork Insulation Co. For that work there was a direct contract between the Cork Insulation Co. and the owners of the ship, that is to say, the Blue Star Line, for whom the ship was being built, and who would ultimately be the owners. Apparently the arrangement was that Cammell, Laird & Co. should be the general builders of the ship, that after launching it should be taken into their basin for finishing, and that then the Cork Insulation Co., who were entirely independent contractors, and in no sense sub-contractors to Cammell, Laird & Co., should come on board to do the work, which they had contracted with the Blue Star Line to do.

In the course of their building of the ship Cammell, Laird & Co. had erected a staging in the forehold, and when the Cork Insulation Co. came on board to do their work Cammell, Laird & Co., for the convenience of the Cork Insulation Co. and not because they were under any duty, contractual or other, to that company, left the staging there, so that that company's men could use it. It was a matter of convenience, but it has not been proved before me that it was a matter of contract between the two companies that Cammell, Laird & Co. should provide this staging. It is clear that it was not, because Cammell, Laird & Co. had nothing to do with the work which the Cork Insulation Co. had to do.

The staging which Cammell, Laird & Co. left in the hold was, so far as there is any evidence about it, perfectly properly constructed staging, and although the boards extended 18 inches or more beyond the inside edge of the bearers on which they rested, Cammell, Laird & Co.'s men did lash those boards which formed the staging so that they could not move; but the Cork Insulation Co. wanted the lashings removed, because they said they were dangerous to their men who were walking about upon them. When the lashings were removed the defendants still complied with the Shipbuilding Regulations, 1931, reg. 13, because the planks extended beyond the inside edge of the bearers; but the boards were loose and could be moved, and it seems that for some reason or another—I am inclined to think because of the pulling across of the skips in which powdered cork was loaded—one of these planks got loose, and when the plaintiff stepped upon the plank it gave under his feet because it was off the bearer. He was thrown into the hold and sustained serious injury, in regard to which I will assess the damages at the end of my judgment, in case my decision is reversed by a higher Court.

Is there, in these circumstances, any cause of action by the plaintiff against Cammell, Laird & Co. ? In my opinion there is not. I am not concerned with what the position would have been—and it might, I think, have been quite different—if the Cork Insulation Co. had been Cammell, Laird & Co.'s sub-contractors. In these circumstances it might mean that Cammell, Laird & Co. were under some duty, contractual or other, to erect a staging for their sub-contractors. In this case they were under no duty whatever to the Cork Insulation Co. to erect this staging, but they allowed them to use it as a matter of convenience to that company. If they allowed them to use a staging which they knew to be unsafe when they handed it over to them, very likely they would have been liable; but the staging as they handed it over to the Cork Insulation Co., or rather as they allowed the Cork Insulation Co. to use it, was, as I find, a perfectly safe staging. It came into a condition that could be made unsafe by reason of what the Cork Insulation Co. asked should be done to it. It was for the Cork Insulation Co. to decide what sort of staging they wanted, and to say how they wanted it altered for the convenience of their work. They had it altered by having the lashings taken off. It was no doubt because of the lashings being taken off that the boards became loose and allowed this accident to happen.

I must also deal with one other point. It seems that Cammell, Laird & Co. have a gang of men who go round the ship once or twice a day inspecting all the staging. They were in the habit of inspecting this staging, and if there was anything wrong with it they put it right; but they were under no contractual duty, and I think under no common law duty, in the circumstances to the Cork Insulation Co. to maintain this staging. They simply allowed them to use it. The Cork Insulation Co. used it as though they themselves had put it up. They had it altered, shifted the boards if they wanted, and did everything they wished. Although, of course, if Cammell, Laird & Co.'s men came round and saw that some part of the staging was a danger, they put it right, that does not, in my judgment, put Cammell, Laird & Co. under a duty to the Cork Insulation Co. to put it right. They had not agreed with the Cork Insulation Co. that they would maintain it. They had lent it, and it was for the Cork Insulation Co. to maintain it and see that it was kept in a safe condition for their workpeople.

That is enough to dispose of the common law point. I think the position, so far as that is concerned, is just the same as if, seeing a properly erected staging in a house or grounds, where a house was being built, some contractor who had to do some work—which the people who erected the staging were not doing but which was being done by a separate independent contractor—came to the main contractor and said: " We are going to do our work now. May we take " over and use your staging ? " To which the main contractor said: " Yes, you may." He hands over a perfectly well constructed stage, and the people who have got this supplementary work to do, altering the stage for their own purposes, turn the safe stage into an unsafe stage. It seems to me impossible in those circumstances to put the original erector of the stage into a position of liability for any accident that may happen in that state of affairs. So too, if he sees that the staging is unsafe and puts it right, he has not thereby undertaken a duty to maintain it ; he does it as a voluntary act, as any person would, if he saw an obvious danger. Because they may do that as a matter of routine in going round inspecting other stages for themselves, it does not seem to me that that puts them under a duty to the Cork Insulation Co. to maintain the stage.

The other point which was argued by Mr. Goldie is this: He says under the Shipbuilding Regulations made under the Factory and Workshop Acts Cammell, Laird & Co., as owners of this dock, are under an absolute obligation to see that every staging erected in the ship is safe, and that they cannot rid themselves of their obligations under the Shipbuilding Regulations merely because some independent contractor has come on the premises. I do not think that argument is sound, for this reason. The duty cast by the Regulations is upon the occupier, and I think for the purpose of this operation the Cork Insulation Co. were the occupiers of this staging, or of this part of the ship, for this purpose. It seems to me that the position would be the same if there had been a demise or letting by the owners of the dock to some firm of contractors, who came forward and erected a stage for their own purpose in repairing or building a ship. The case which Mr. Goldie referred me to, *Raine* v. *Jobson & Co.* (1), if properly understood, supports that view. That was a case where the owners of a dock let it to ship repairers, who then employed their own men, one of whom met with an accident. It was held that he had the rights against the ship repairers, who, for that purpose, were the occupiers of the dock or factory, a dock regarded as a factory under the Workmen's Compensation Act. If that case had decided that the owners of the dock were liable, then the case would have been on all fours with this case, and would have been an authority to say that Cammell, Laird & Co. could be liable; but I think the duty that is thrown by the Shipbuilding Regulations in this case was upon the Cork Insulation Co., who were doing the work of construction at the time. They were doing this work of construction, and I think it was for them to see that the statutory obligation was fulfilled. The statutory obligation in regard to maintaining this staging was on the Cork Insulation Co. and not on Cammell, Laird & Co. at that time. Cammell, Laird & Co. had handed over this part of the ship to the Cork Insulation Co., who were doing the work there. It is true that Cammell, Laird & Co.'s men went round and did look at this staging from time to time, but they looked at every staging on the ship. I do not think they were under a duty to the Cork Insulation Co. to do it, and the view I take

---

(1) [1901] A. C. 404.

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& CO.

Goddard J.

of these Regulations is that the duty was not thrown on them by the Regulations.

I do not think the plaintiff has any cause of action against Cammell, Laird & Co. In my judgment this action fails and must be dismissed with costs.

His Lordship assessed the special damages at 260*l.*, and other damages at 500*l.*, the total being 760*l.*

The plaintiff gave notice of appeal dated May 25, 1937, for an order that the findings and judgment of Goddard J. should be set aside and judgment entered for the plaintiff in the action for 760*l.*, or alternatively that a new trial be had between the parties, and further gave notice that the whole of the said findings and judgment were complained of.

The appeal was heard on March 8 and 9, 1938.

Goldie K.C. and *C. N. Shawcross* for the plaintiff, appellant. Goddard J. was wrong in holding that the plaintiff had no cause of action against the defendants. Under the Factory and Workshop Act, 1901, s. 149, sub-s. 1, and Sixth Schedule, Part II. (25.), subject to the provisions of that section, a shipbuilding yard is a factory for the purposes of the Act. By virtue of these provisions a shipbuilding yard as a whole, including every part of it, is a factory unless under s. 149, sub-s. 2, a part of it has with the approval in writing of the chief inspector been taken to be a separate factory, or under s. 151 the Secretary of State has by special order directed that different branches or departments of work carried on in the yard shall be treated as different factories. It does not appear that any part of the defendants' shipbuilding yard has been made a separate factory under either s. 149, sub-s. 2, or s. 151, and, consequently, the whole of the shipbuilding yard and every part of it, including the wet dock in which the *Dunedin Star* was lying and that vessel itself, constituted one factory. Though the Act refers to the " occupier " of a factory, it does not contain any express definition of that word. In several cases, however, the meaning of the word has been judicially expounded, as, for example, in *J. & R. Ramsay* v.

Mackie (1), where Lord M'Laren said: "'occupier' plainly "means the person who runs the factory or warehouse, who "regulates and controls the work that is done there, and who "is responsible for the fulfilment of the provisions of the "Factory Act within it." According to that view the defendants were the occupiers of the shipbuilding yard as a factory, including the dock, the vessel, and every part of the vessel, and they must have continued to be the occupiers of the vessel, and of every part of it, until they had completed its construction and handed it over to the owners. They and not the Cork Insulation Co. were the occupiers of the part of the vessel in which the staging was erected and of the staging, for they could have excluded that company from the vessel, including the staging. The defendants being the occupiers of the vessel and of the staging, which they had themselves erected, allowed part of the staging to be in so defective a state as to constitute a trap for persons using the staging, and they invited the insulation company and its employees, including the plaintiff, to come upon the staging and make use of it for the purpose of carrying out work in which the defendants and that company had a common interest—namely, the work of completing the vessel for her owners, and owing to the defective condition of the staging the plaintiff in making use of it fell and sustained injuries. In these circumstances the plaintiff has a right of action at common law against the defendants for damages for the injuries caused to him by their negligence. The plaintiff has also a right of action against the defendants for damages for his injuries on the ground that they were caused by the defendants' breach of their statutory duties. The Shipbuilding Regulations, 1931, made under s. 79 of the Act of 1901, impose a duty upon the occupier of a shipbuilding yard and any part of it, including a ship under construction therein, to comply with the Regulations, Part II. of which deals with staging, reg. 11 (*b*) of that Part providing that "all staging shall be securely constructed of sound and "substantial material and shall be maintained in such

---

(1) (1904) 7 F. 106, 109.

"condition as to ensure the safety of all persons employed." These Regulations refer to a shipbuilding yard as a whole, and they could not be carried out by any one except the occupier of the yard. Even although the point was not taken before Goddard J. that the defendants could not transfer any part of their premises to another person so as to make that part of the premises a separate factory and that person the occupier of a factory, all the facts necessary to raise the point were before Goddard J. and are now before this Court, and this Court has a discretion to allow the point to be raised: see Annual Practice, 1938, p. 1288*n*. Here the defendants were the occupiers of the dock in which the vessel was lying, for it was comprised in their shipbuilding yard. The defendants were also the occupiers of the vessel, because the dock in which she was being completed was not a public dry dock, as to which the Regulations say that the person doing the repairs shall be the occupier, but was the private dock of the defendants. Moreover, the defendants remained in occupation of the vessel until she was ready to be delivered to her owners. The defendants were also in occupation of the staging, which they not only erected, but were under a statutory duty to construct properly and to maintain in a safe condition, and they did not hand it over to the insulation company. The Shipbuilding Regulations, 1931, as regards the particular matters for which they provide, treat the shipbuilding yard as a whole as one factory and the shipbuilder as the occupier of that factory and, as such, the person alone liable to carry out the Regulations in the yard and every part of it. They are inconsistent with and supersede the provisions of the Act, such for example as ss. 79, 104, and 149, which make a part of a factory a separate factory. Reg. 45 of these Regulations shows, first, the impossibility of working if the dock is divided, and secondly, that this regulation was not complied with by the inspector. These Regulations differ entirely from the Docks Regulations, 1934 (St. R. & O., 1934, No. 279), which treat a dock as a separate factory and distinguish between the person who has the occupation of the dock as a whole and a person who may have the exclusive occupation of part of it.

The defendants, as occupiers of their shipbuilding yard, were charged with the statutory duty of observing the Shipbuilding Regulations therein, and when, in reconstructing the staging to suit the convenience of the insulation company, they allowed the lashings of the planks to be removed they were guilty of a breach of the Regulations, and they were liable to the plaintiff for the injury thereby caused to him. The fact that the Act and the Regulations make the person having the general control of the factory as a whole the occupier thereof and responsible for what is done therein does not necessarily impose upon him the hardship of rendering him liable for the default of another person, because s. 141 enables him to escape liability on conviction of the actual offender.

These views are borne out on the whole by the decided cases. In *Jackson* v. *A. Rodger & Co.* (1) shipbuilders had built a ship in their yard, and, after she was built, she was sent to a dock about twenty miles away to have her engines put in. While she was in that dock a workman in the employment of the firm of engineers was injured, and it was held that the shipbuilders were "occupiers" of the dock as a factory at the time of the accident and were therefore liable to the workman. In *Low* v. *James Abernethy & Co.* (2) it was held that a ship lying in a dock was not a factory. In *Raine* v. *Jobson & Co.* (3) ship repairers took a ship into a dry dock which they had hired for the purpose of cleaning and repairing her, and one of their workmen fell into the dock and was killed. It was held that the dock was a factory and the ship repairers the occupiers thereof within the meaning of the Workmen's Compensation Act, 1897, and were liable to pay compensation. In *Houlder Line, Ld.* v. *Griffin* (4) it was held by the House of Lords that a ship afloat in a dock does not of necessity become part of the dock or premises within the dock so that the owner of a ship which was afloat within a wet dock would not merely because of that circumstance become "the person having the actual use or occupation of "the dock or of any premises within the same or forming

(1) (1899) 1 F. 1053, 1054.
(2) (1900) 2 F. 722.
(3) [1901] A. C. 404.
(4) [1905] A. C. 220.

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& CO.

"part thereof" so as to be deemed to be the occupier of a factory. In *Burdon* v. *Gregson & Co.* (1), where the respondents were doing repairs to the refrigerating chambers of a ship lying in a dry dock which had been hired by the owners of the ship, and a workman in the employ of the respondents was killed while engaged in their work, it was held that the respondents were not in occupation of the whole ship and could not be deemed to be the occupiers of a factory and as such liable for the accident. In *Bartell* v. *W. Gray & Co.* (2), where the defendants contracted to do painting and plumbing on a ship lying in a dock, and one of their employees was injured by an accident in the course of his employment, it was held that the ship was a factory within the meaning of the Workmen's Compensation Act, 1897, and that the possession of the shipowners did not prevent the contractors from having the actual use or occupation of the ship within the meaning of the Factory and Workshop Act, 1895. That case must, however, be regarded as inferentially overruled by *Houlder Line, Ld.* v. *Griffin.* (3) In *Merrill* v. *Wilson* (4) it was held that, where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of a portion of the quay for the purpose of unloading the ship's cargo, they had the actual use of that portion of the quay. In *Weavings* v. *Kirk & Randall* (5) the respondents had contracted to make pigeon-holes in the upper storey of a warehouse which was being built for the Government by other contractors. The Government were in possession of the lower storey and were doing work on the floor on which the respondents were working. A workman of the respondents having been killed it was held that they were in actual use or occupation of the warehouse within s. 104 of the Act of 1901.

F. A. Sellers K.C. and *Selwyn Lloyd* for the defendants, respondents. The plaintiff cannot maintain this action against the defendants. The question is whether in this case the obligations imposed by the Shipbuilding Regulations, 1931, reg. 11, of securely constructing, maintaining and

(1) [1906] 2 K. B. 275, 283.
(2) [1902] 1 K. B. 225.
(3) [1905] A. C. 220.
(4) [1901] 1 K. B. 35.
(5) [1904] 1 K. B. 213.

inspecting the staging in the vessel rest upon the Cork Insulation Co., or upon the defendants. It is submitted that these obligations rest upon that company and not upon the defendants. The Regulations provide that when a ship is being repaired in a public dry dock the person executing the work of repair shall be deemed to be the occupier whose duty it is to comply with the Regulations, and that provision or an implied corresponding provision should be taken to apply to a case such as the present in which work is being done upon a ship in a private dock. Whether that be so or not, there are other sufficient grounds for the view that the liability is that of the insulation company and not of the defendants. The Regulations were made under s. 79 of the Act, which provides for the making of such regulations for the safety of persons employed in any description of manual labour used in factories, but that section does not define the word "factory." In order to get some light upon the meaning of that word in this connection reference must be made to s. 104 of the Act, which provides that the provisions of the Act with respect to regulations for dangerous trades shall have effect as if every dock and each of certain other places were included in the word "factory," and that for the purpose of the enforcement of those provisions the person having the actual use or occupation of a dock or of any premises within the same or forming part thereof shall be deemed to be the occupier of a factory. That section does not give an exhaustive definition of the word "factory" for this purpose, but is only a glossary illustrating the meaning of the word by particular examples and implying that it may extend to other places also: see per Lord Atkinson in *Mackey* v. *James Henry Monks* (*Preston*) *Ld.* (1) Under s. 104 in its application to such a case as the present either the shipbuilding yard, the dock, the ship, or the staging in the ship may be a factory, and the persons having the actual use or occupation of any of these places may be the occupier of a factory. Moreover, the same premises may at the same time be a factory in themselves and also part of another factory, and the occupiers of both these factories might perhaps for different purposes be in occupation of the same premises. It is a question of fact in each case whether particular premises are a factory, and who is the occupier of that factory. In the present case though the shipbuilding yard, or the dock, or the ship may be a factory and the defendants the occupiers of that general factory, yet the staging or the part of the ship in which the staging is erected is a separate factory, and the insulation company as the persons having the actual use or occupation of that separate factory are the occupiers thereof. The defendants had no doubt erected, occupied and used the staging for the purposes of their own work as shipbuilders, but that was now finished. They only allowed the staging to remain for the convenience of the insulation company, to whom they handed it over. The insulation company took sole possession of the staging and employed it exclusively for the purposes of their own work. The staging being so used by that company was a factory, and that company having the actual use and occupation of that factory must be deemed to be the occupiers thereof within s. 104. In these circumstances the obligation under the Shipbuilding Regulations, 1931, to securely construct and maintain the staging cannot be that of the defendants but must be that of the Cork Insulation Co. Even if under the Act and the Regulations the defendants are, for the purposes of the Regulations, the occupiers of every part of the shipbuilding yard, including the staging, yet under s. 141 they are exempt from liability for the defect in the staging because they can show that that defect was due to the default of the insulation company.

---

(1) [1918] A. C. 59, 82.

Goldie K.C. in reply. The Shipbuilding Regulations, 1931, relate to the construction and repair of ships in shipbuilding yards and impose the duty of observing these Regulations for safety upon the person in occupation of a shipbuilding yard or a ship therein. Sect. 104 of the Act of 1901, however, provides that the provisions of the Act with respect to regulations for dangerous trades relate to certain places none of which is a shipbuilding yard or a ship, and to certain processes in these places none of which resembles the work of the Cork Insulation Co. It is these Regulations and not that section which apply to the present case and render the respondents liable for the defect in the staging in question. There is no evidence that the staging was ever handed over by the defendants to the Cork Co. so as to render that company liable for breach of the Regulations.

Cur. adv. vult.

1938. April 12. The following judgments were read :—

GREER L.J. (whose judgment was read by SLESSER L.J.). For some time prior to November 6, 1935, the defendants were engaged under contract to build a vessel for the Blue Star Line. The vessel is referred to in the evidence as the steamship *Dunedin Star*, and in all probability she was so named when launched. After being launched she was taken into a wet dock, part of the defendants' shipbuilding premises on the River Mersey. The work of finishing the vessel for the purpose for which she was required was done partly by the defendants, and partly by tradespeople employed directly by the Blue Star Co. Amongst the firms employed by the Blue Star Co. was the Cork Insulation Co., who employed the plaintiff to do certain insulating work they had undertaken to do for the Blue Star Co. The work on which the plaintiff was engaged was on a stage in the lower hold of the *Dunedin Star*, and owing to a defect in that staging, he met with a serious accident, and brought an action against the defendants.

The only question litigated at the hearing before Goddard J. was whether the defendants continued in occupation of the ship and every part thereof, or whether they had handed over possession and occupation of the staging to the Cork Insulation Co. It was not suggested that under the Regulations the defendants could not hand over any part of their premises to an occupier so as to make such occupier an occupier of a factory within the meaning of the Regulations. It was established by the evidence that the defendants' workmen were not working on the staging, that the staging was, at the time of the accident, solely required for the purposes of the

Cork Insulation Co., that the Cork Insulation Co. was a company controlled by the Blue Star Line, the owners of the *Dunedin Star*, that the plaintiff's employers did the insulation, that the defendants had nothing whatever to do with the insulation, and that the staging had been handed over to the Cork Insulation Co. by the defendants for the use of the Cork Insulation Co.'s workmen. While it was so occupied, one of the planks seems to have got displaced, and the plaintiff fell through the staging into the lower hold and received severe injuries. At times another firm named Hall used the staging, but at the time of the accident to the plaintiff the Cork Insulation Co. were the sole occupiers of the staging.

Some cases were cited by counsel for the plaintiff relating to the occupation of part of a vessel in a dry dock or a wet dock by tradespeople, but no contention was put forward at the trial to the effect that in law shipbuilders as the occupiers of a shipbuilding yard, which is a factory subject to the Regulations made by the Minister, were the only people who could be held liable as such occupiers, and no such contention was put before this Court by Mr. Goldie in his argument before us; but the plaintiff was also represented by Mr. C. N. Shawcross, who had not been present at the hearing. It is sometimes thought to be an advantage to an appellant, or a respondent, to be represented by counsel who were not present at the hearing, because such counsel, without a blush or apology, is able to raise some question that counsel present at the hearing would be unlikely to raise, except in an apologetic manner.

It is provided by s. 149, sub-s. 2, of the Factory and Workshop Act, 1901, that a part of a factory or workshop may, with the approval in writing of the chief inspector, be taken for the purposes of the Act to be a separate factory or workshop, and it is provided by s. 151 that the Secretary of State may, by special order, direct with respect to any class of factories or workshops, that different branches or departments of work carried on in the same factory or workshop, shall, for all or any of the purposes of the Act, be treated as if they were different factories or workshops. Whether there was, or was not, an approval in writing of the chief inspector to the effect that the staging should be treated as a separate factory or workshop, or an order by the Secretary of State under s. 151 which would have the same effect, is a question of fact. If the contention had been put forward at the trial it might have given rise to a right to prove a fact that would have constituted the staging a separate factory. I am not suggesting that this would, in fact, have been proved. It is sufficient to say that it might have been proved, and accordingly, as was stated in *The Tasmania* (1): "a point . . . ., "not taken at the trial, and presented for the first time in the "Court of Appeal, ought to be most jealously scrutinised. . . . . "a Court of Appeal ought only to decide in favour of an "appellant on a ground there put forward for the first time, "if it is satisfied beyond doubt, first, that it has before it all "the facts bearing upon the new contention, as completely "as would have been the case if the controversy had arisen "at the trial; and next, that no satisfactory explanation "could have been offered by those whose conduct is impugned "if an opportunity for explanation had been afforded them "when in the witness box." (See also other cases cited at pp. 1288–9 of the Annual Practice, 1938.) I think we ought not to be satisfied beyond doubt that we have before us all the facts bearing upon the new contention put forward by Mr. Shawcross, and referred to in the judgment of Slesser L.J., which I have had the opportunity of reading. In my opinion we ought in our discretion to refuse to listen to this belated argument. I further think that even if we do entertain it, it is not entitled to any weight, having regard to two decisions of the Court of Appeal. In *Bartell* v. *W. Gray & Co.* (2) it was held that certain employers who were doing work on a ship in a dock were in occupation of that part of the dock which was occupied by the ship, though there was no work of loading or unloading going on. In that case it was contended for the employers that as the Act speaks of the person having the actual use or occupation, it shows that the Act contemplates that there shall be one such person, and that it could not

---

(1) (1890) 15 App. Cas. 223, 225. (2) [1902] 1 K. B. 225.

C. A.
1938

SMITH
v.
CAMMELL, LAIRD & Co.

Greer L.J.

mean that every person who has in the course of business to go into part of a ship in a dock, has, for the purposes of the Act, the actual use or possession of that portion of the ship where for the time being he is in the performance of his business. This argument is very like the argument in the present case put forward by Mr. Shawcross. The Court of Appeal refused to accept the argument. In the course of his judgment, Sir Henn Collins M.R. said (1): "The ship was lying in a "dock, and was therefore occupying part of a factory, and "the person in possession of the ship would come within the "description of a person having the actual use or occupation "of a dock or of premises forming part thereof. Sect. 23 "of the Factory and Workshop Act, 1895, contains a provision "that for the purpose of the enforcement of certain "enumerated sections of the Factory and Workshop Act, "1878, the person having the actual use or occupation of a "dock, wharf, quay, or warehouse, or of any premises within "the same or forming part thereof, shall be deemed to be the "occupier of a factory." That provision is now reproduced in s. 104 of the Factory and Workshop Act, 1901. The learned Master of the Rolls then refers to the decision in the House of Lords in *Raine* v. *Jobson* (2), overruling *Flowers* v. *Chambers.* (3)

The other of the two cases mentioned above is *Weavings* v. *Kirk & Randall* (4), where it was held that though a warehouse is made a separate factory by the Factory and Workshop Act, 1901, and the Rules thereunder, a defendant who had such use and occupation of part of the warehouse as was necessary for the work that he had contracted to do, was in actual use or occupation thereof within the meaning of the Factory and Workshop Act, 1901, s. 104. The Court there expressed their approval of and followed the case of *Bartell* v. *W. Gray & Co.* (5), and treated it as applying to a warehouse, though a warehouse is just as much a separate factory as a dock or shipyard. For these reasons, so far as this Court is concerned, the point made by Mr. Shawcross ought to be rejected.

---

(1) [1902] 1 K. B. 229.
(2) [1901] A. C. 404.
(3) [1899] 2 Q. B. 142.
(4) [1904] 1 K. B. 213.
(5) [1902] 1 K. B. 225.

It was contended in the present case that since the Regulations made under s. 79 of the Factory and Workshop Act, 1901, which made shipbuilding premises a factory within the Act, the provisions relating to docks could no longer apply to a dock which was part of a shipbuilding yard. It appears from the cases already cited that as regards a dock, whether wet or dry, the actual occupation might be in some one other than the dockowner or the shipowner. Before the new Regulations relating to shipbuilding yards came into force, it could not, I think, have been contended that under s. 104 of the Act there could not have been an occupation by the Cork Insulation Co. I think the fact that all of the yard was made a factory within the Act by s. 79 of the Act and the Regulations made thereunder has not the effect of taking a part of the yard which was in fact a dock outside the area of s. 104, which was the equivalent section to that which, in the earlier Act, would have applied to the dock in question.

Reliance was also placed by Mr. Shawcross on the cases of *Smith* v. *Standard Steam Fishing Co., Ld.* and *Burden* v. *Gregson & Co.* (1), but these cases seem to me to have no application to the facts established in this case, as the defendants there, who were merely working in a ship in a dock, could not in the absence of any evidence as to the part of the ship of which they had the actual use or occupation be brought within provisions similar to those now contained in s. 104. Nor do I think that the case of *Houlder Line, Ld.* v. *Griffin* (2), in the House of Lords, affects the question, inasmuch as the claimant in that case was a seaman performing his ordinary duties as a seaman at the time when ships were not brought within the purview of the Factory Acts. It seems to me that the last-mentioned case is merely a decision that a seaman, doing his ordinary work in a vessel while in dock, was not at the time of the decision a workman to whom the Workmen's Compensation Act applied, though there are some dicta of some of their Lordships which indicate that, in their view, the owner of a ship afloat in a dock was not in any sense the occupier of the dock. Warehouses were made factories

(1) [1906] 2 K. B. 275.

(2) [1905] A. C. 220.

by the Act of 1901, and s. 104 applies to them. There might quite easily be a warehouse in a shipbuilding yard. If so, I think it would be none the less a warehouse subject to the special provisions of s. 104, and it would be possible for any Court to hold on sufficient evidence that each floor of the warehouse had been let to and was occupied by a different person, who would then be the actual occupier within s. 104.

For the reasons I have stated, this appeal should be dismissed with costs.

Slesser L.J. In this case, the question has arisen who is the occupier within the meaning of a statutory regulation made under the Factory and Workshop Act, 1901, of a staging in a ship which, by reason of its defective maintenance in proper condition, caused damage to the appellant?

The appellant bases his case upon breach of statutory Regulations in Statutory Rules and Orders, 1931, No. 133—the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901,—Part II., cl. 11 (*b*), to the effect that "all staging shall . . . . be maintained in such "condition as to ensure the safety of all persons employed," and maintains that the respondents as occupiers, whose duty it is to observe the Regulations, are responsible for damages flowing from breach of their statutory obligation. The respondents deny that they were at material times such occupiers, and the judge has so found and consequently given judgment in their favour. As I have said, the real problem raised in this case is: What is the proper meaning to be given to the word "occupier" in the Regulations?

In order adequately to deal with this question, it is necessary to examine the relevant provisions of the Factory and Workshop Act, 1901, under which these Regulations are made. By s. 79 of that Act, where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour used in factories is dangerous, he may certify it to be dangerous, and thereupon may make such regulations as may seem to him reasonably practicable and to meet the necessities of the case.

By s. 82, regulations made under the foregoing provisions may be applied to all factories in which the manufacture, etc., certified to be dangerous is used or to any specified class of such factories. They may provide for the exemption of any specified class of factories. I omit words not relevant.

Thus, ss. 79 and 82, as such, do not impose any liability. Their combined effect is to give power to the Minister first to make regulations, after certification, and then to apply them to such factories as he may prescribe. It is under these powers that he has made the Regulations applicable to this case. Under s. 79, he has certified a dangerous industry and applied his powers to the construction and repair of ships (that is to define the process) in shipbuilding yards, that is, under s. 82 he has defined the class of factory. This latter power he possesses because a shipbuilding yard is expressly defined as a non-textile factory by the Sixth Schedule, Part II. (25.), that is, generally, where mechanized power is used, "any "premises in which ships, boats or vessels used in navigation "are made finished or repaired."

It can hardly be questioned, regarding the premises as a whole from the standpoint of a regulation applied to occupiers under s. 82, that the respondents are the occupiers of the factory, the whole shipbuilding yard; but it is said that the portion where this defective staging stood was at relevant times in the occupation of another company, the Cork Insulation Co., to whom as occupiers the duty to maintain the staging above mentioned attached.

Subject to a particular argument, which I will consider hereafter, I do not think that, save in special circumstances which admittedly do not arise here, there can, within the contemplation of the Factory Acts, be more than one occupier for one factory. The exceptional circumstances to which I refer are the cases where a part of the factory, with the approval of the chief inspector, is to be taken to be a separate factory (s. 149, sub-s. 2), or where the Secretary of State, by special order, has directed that different branches of work carried on in the same factory shall be treated as if they are separate factories (s. 151). Neither of these cases

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& Co.

Slesser L.J.

arises in the present appeal. This unity of occupation is made particularly clear by a consideration of ss. 140, 141 and 142. Sect. 140 provides for fines upon persons actually committing offences for which the occupier is liable. Sect. 141 provides power for the occupier to exempt himself from fine on conviction of the actual offender, and s. 142, in certain cases, makes the owner of a machine liable instead of the occupier. So far, apart from contentions still to be considered, I think that there can be no doubt that where s. 82 of the Act is invoked by the Secretary of State, the extant Regulations made under s. 79 (save for certain provisos in those Regulations otherwise defining the occupier, which do not here apply) must be read as imposing duties on the occupier of the factory as such, in this case the respondents.

I pass, therefore, to an argument which formed the principal subject for consideration at the trial, that this case is governed by s. 104 of the 1901 Act, which does contemplate part occupation, to which so far I have not drawn attention. In that section, by sub-s. 1 it is provided that for the purpose of the enforcement of the provisions of the Act with respect to (iii.) Regulations for dangerous trades " the person having "the actual use or occupation of a dock, wharf, quay, or "warehouse or of any premises within the same or forming "part thereof . . . . shall be deemed to be the occupier of "a factory."

The learned judge has found as a fact, on consideration of the evidence, that the persons so having the actual use and occupation of that part of the dock where the staging was, was the Cork Insulation Co. I do not think it necessary here to discuss the authorities (mostly on s. 7 of the Workmen's Compensation Act, 1897, on a corresponding section of the earlier Factory and Workshop Act, 1895, by way of reference), which appear to support the view that the question of occupation of a part of a dock depends upon the circumstances of the case, for, in my opinion, the definition of "occupier" in s. 104 has no application in the case of an actual factory to which Regulations made under s. 79 have been directly applied by s. 82. As was stated by several

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& CO.

Slesser L.J.

members of the House of Lords in *Mackey* v. *James Henry Monks* (*Preston*), *Ld.* (1), all that s. 104 does is to create its subject-matter—the dock, wharf, quay, and warehouse and certain machinery or plant—a notional factory for certain defined purposes only. That section, as was pointed out in *Mackey's* case (1) by Lord Parker (2), does not create any liability: "It merely creates certain notional factories for "the purposes of the other sections therein specified, and, "inasmuch as some of these other sections impose a liability "on the occupier, defines who is to be deemed the occupier, "such a definition being necessary if the liability was to be "enforced." (2) Thus, s. 104 extends the power of the Minister to make regulations for dangerous trades (the power given him under s. 79) to cases not covered by s. 82 where the place, apart from s. 104, might not be a factory—in such a case, "the regulations are said to have been made under the "provisions of s. 79—with which must be read s. 104": per Lord Finlay L.C. in *Mackey's* case. (3)

It is said that in this case, in so far as this accident occurred in a dock, the provisions of s. 104 as to part occupiers must be applied. I do not agree. Had we to construe regulations made under that section, such as the Docks Regulations, 1934, which have in fact been made, the argument might be sound; but the Shipbuilding Regulations, 1931, are not concerned with occupiers as so defined in different regulations made under a different power—there is no reference to staging in the Docks Regulations extant—but here the sole question is concerned with the meaning of the word "occupier" in the Shipbuilding Regulations, and I am unable to see how a definition secundum subjectam materiam can affect the matter.

The conclusion, therefore, at which I arrive is that s. 104 has no application to the Regulations made in the present case under ss. 79 to 86. If this view be correct, s. 82 makes it clear to my mind, when read with the other relevant sections which I have cited, that the word "occupier" in these present

(1) [1918] A. C. 59.
(2) Ibid. 88.
(3) [1918] A. C. 70.

Regulations means the occupier of a factory as a whole and that, though for the purpose of regulations under s. 104 not here applied, the Cork Insulation Co. might have to be regarded as being in part occupation of a dock, that fact does not make them occupiers for the purpose of this case, where the occupier must, of necessity, be the occupier of the whole factory.

The case which has given me the greatest trouble in accepting the argument of Mr. Shawcross, junior counsel for the appellant on this head, is that of *Weavings* v. *Kirk & Randall* (1), in which, dealing with a warehouse, Sir Henn Collins M.R. said (2): " It is admitted that this warehouse "was a 'factory' within the Act." He, nevertheless, applies s. 104 to it and quotes the relevant words " the person having "the actual use or occupation of a . . . . warehouse . . . . shall "be deemed to be the occupier of the factory." If, by these words, Sir Henn Collins is to be understood to be saying that the warehouse was a factory, apart altogether from s. 104, and yet s. 104 applied, it would be an authority supporting the view of the learned trial judge ; but in my opinion, when that case is considered, I think that his Lordship was saying no more than that it was admitted in that case that the warehouse was a factory of the notional kind created by s. 104 itself. The problem was that of the application of s. 104 of the Workmen's Compensation Act and not of the construction of a regulation made under s. 79. It is not every warehouse which apart from s. 104 is a factory, but only certain warehouses such as those mentioned in Part I. of the Sixth Schedule to the Act and, possibly, places named in Part II. of that Schedule within the curtilage of which steam, water or other mechanical power is used in aid of the manufacturing process carried on and incidental manual labour, together with certain premises defined under s. 149, sub-s. 1, as textile factories. No evidence was given in *Weaving's* case (1) that the warehouse was a factory, other than notional, and in that case, as in all the others cited to us, the problem raised by Mr. Shawcross, in my view, did not arise.

(1) [1904] 1 K. B. 213. (2) Ibid. 216.

Had the Regulations here to be construed been regulations under s. 104, as might have been the case if we were here considering dock regulations or regulations applicable to warehouses which were not notional factories, the defendants might have shown that they were not occupiers within that section or such regulations, but such a conclusion does not seem to me to conclude the present point. The fundamental question is, what do regulations made under s. 79, dealing with a factory as such, mean when they speak of the "occupier"? None of the cases seems to me to decide this point. I think it is res integra.

Finally, I must deal with the objection that the argument of Mr. Shawcross admittedly was not raised below. On a jealous scrutiny, such as is directed by *The Tasmania* (1), I am satisfied beyond doubt that we have before us all the facts bearing upon his new contention, and it is not a case which turns upon evidence which was not thoroughly examined in the Court below. The only possible evidence which might have been given on this head would have been that the area of the staging had been partitioned as a separate factory under s. 149 or s. 151. To my mind, it is inconceivable that in the temporary building of a ship such a procedure could have been or would have been invoked, and if it had been, it would have been so conclusive in favour of the defendants that I cannot doubt that it would have been proved. Discovery disclosed no such orders and no suggestion to this effect was, at any time, made before us, nor was a reply sought to raise the matter. In my view, it would be wrong in such a case, if Mr. Shawcross's argument were right, to refuse to allow justice to be done upon this plea, and I think that any consequences might have been corrected by an appropriate order as to the costs; but as the majority of the Court are of a different opinion upon the principal issue, this matter does not arise.

CLAUSON L.J. In this case the plaintiff sues the defendants for personal injuries sustained by him. [His Lordship

---

(1) 15 App. Cas. 225.

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& CO.

Clauson L.J.

stated shortly the principal facts and continued as follows :]
The learned judge held the action to be misconceived.

In the first place, the plaintiff based his claim on breach by the defendants of a common law duty towards him. The judge negatived any such duty and found the claim, so far as it was based on any such duty, unsustainable. I do not desire to add anything to what appears in the judgment of the learned judge on this part of the case.

The claim was, however, alternatively based on the suggestion that under the Factory and Workshop Act, 1901, and the Shipbuilding Regulations, 1931, made thereunder, the defendants were under an absolute statutory obligation to see to the safety of the staging, as being occupiers of the locus in quo. The learned judge rejected this ground of claim, holding that the obligation imposed by the Act and the Regulations under it was imposed not on the defendants but on the Cork Insulation Co., the latter company and not the defendants being, in his view, on the facts as I have outlined them, the occupiers at the relevant time for all material purposes of the place where the accident occurred.

The matter stands thus. The shipbuilding yard in question is admittedly, by reason of s. 149, sub-s. 1, and the Sixth Schedule, Part II., cl. 25, of the Factory and Workshop Act, 1901, a factory in respect of which the Minister may under s. 79 certify (as he has in fact certified) that construction and repair of ships is dangerous, and may accordingly make the regulations which he has in fact made in the shape of the Shipbuilding Regulations, 1931. Under those Regulations it is the duty of the occupier of this yard to comply with regulations in respect of staging which had admittedly not in fact been complied with. The plaintiff suggested that the defendants were the occupiers of the yard within the meaning of the Act, and claimed that they accordingly, the Regulations having been broken, were liable to him for the accident resulting from the breach. The learned judge held on the facts which I have summarized above that, in truth, the occupier at the material time of the locus where the staging stood and the accident took place was the Cork Insulation

Co. Argument was addressed to this Court to suggest that the Cork Insulation Co. were not on the facts the occupier of this locus. I need say no more than that on this point I see no ground whatever for differing from the learned judge's findings as to the fact of occupation.

It appeared at one stage of the case as though that would be the end of the appeal. But a fresh point, which does not appear to have been argued below (at all events, there is no trace in the learned judge's judgment of its having been presented to him), was suggested in a very able and ingenious argument put forward by Mr. C. N. Shawcross for the appellant. The argument, as I understood it, ran thus. The Shipbuilding Regulations, 1931, put the duty (which has ex hypothesi been neglected) on the occupier of the shipbuilding yard. The proviso to the clause in the Regulations headed " Duties," referring to circumstances not present in this case, indicates, so it was said, that in the absence of those circumstances the occupier on whom the duty is placed is the occupier of the shipbuilding yard as a whole, in this case the defendants, who cannot avoid their obligations by handing over occupation of a vessel or part of a vessel within the yard to others. The question, however, does not necessarily turn on the Regulations. It is necessary to consider whether there is anything in the Act which bears upon the point in issue. I do not find it necessary to consider the interesting question how far and in what circumstances a factory can, for the purpose of the Act, be treated as in part occupied by one party and in part by another. Several of the cases cited to us in argument illustrate the difficulties as to " occupation " which arise from the fact that in a shipbuilding yard you may, in a wet or even in a dry dock, have a vessel lying physically within the perimeter of the yard of which it would be almost ludicrous to say that it is occupied by the general occupier of the yard, the fact being that it may be wholly or in part occupied (in all reasonable senses of the word) by a crew or a skeleton crew. These difficulties seem to have presented themselves forcibly to the mind of the Legislature, with the consequence that the Act

C. A.
1938

SMITH
v.
CAMMELL,
LAIRD
& CO.

Clauson L.J.

is found to contain a section, namely s. 104, which seems directed to solving these and similar practical difficulties. That section provides, as pointed out in the House of Lords in *Mackey* v. *James Henry Monks* (*Preston*), *Ld.* (1), a glossary aimed at getting over those and like difficulties by creating "notional" factories, within such a "factory" as a shipyard, for the purpose of the application of such Regulations as those in question. The section is rather awkwardly expressed, as it aims at dealing in the same sentence with certain areas (dock, wharf, quay and warehouse) and certain machinery used for defined purposes: but it appears to me to enact (omitting irrelevant words, and adapting the language to the matters with which this case is concerned) that for the purpose of enforcement of regulations for dangerous trades (scilicet the Shipbuilding Regulations, 1931) the person having the actual use or occupation of a dock or of any premises within a dock or forming part of a dock shall be deemed to be the occupier of a factory. This enactment has, in my judgment, the effect of requiring that, for the purpose of ascertaining the person who under the term "occupier" in the Shipbuilding Regulations, 1931, is responsible for the safety of the staging in question, situate, as it is, in the forehold of the vessel, lying within a dock situate within the defendants' shipbuilding yard, the question to be asked is, who, at the material time (i.e., when the accident occurred), was in actual use or occupation of the locus in question, namely, the forehold, or at all events so much of it as was occupied by the staging. Nothing to be found in or inferred from the language in which the Shipbuilding Regulations are framed can affect the meaning and the operation of this enactment. The learned judge appears to me to have addressed his mind to the relevant question, namely, who was in actual use or occupation of the locus in question, and I can see no ground for criticizing his finding that that person was not the defendants, but the Cork Insulation Co., who, through the plaintiff and a number of other workmen, were actually using and occupying the staging, and the space in

(1) [1918] A. C. 59, 82.

the forehold in which the staging was erected, for the purpose of carrying out certain works of the nature of construction for the customer who was to become in due course on completion the owner of the vessel.

This new point, therefore, in my judgment, fails, and I thus find myself in agreement with the learned judge that the action is misconceived. In my judgment, the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors for the appellant: *Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool.*

Solicitors for the respondents: *Layton & Co., London and Liverpool.*

J. R.

C. A.
1938
March 10, 11, 14, 15, 16; *April* 12.

REARDON SMITH LINE, LIMITED *v.* BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY, LIMITED.

THE "INDIAN CITY."

[1934. R. No. 1844.]

Shipping — Charterparty — Construction—Contract voyage—Deviation—Alternative route—Custom of trade—Evidence.

A charterparty provided that the plaintiffs' steamship should load at Poti on the eastern shore of the Black Sea a cargo of manganese ore and being so loaded should with all convenient speed proceed to a port in the United States and there deliver the same; that the steamship had liberty to call at any port or ports in any order or places to bunker, or to deviate for the purpose of saving life or property; that the owners were not to be called upon to take bunkers from the charterers; and that general average should be adjusted in accordance with English law and custom. The bill of lading incorporated the provisions of the charterparty. The steamship, having loaded the cargo at Poti, instead of proceeding direct to the outlet from the Black Sea by the Bosphorus, proceeded first for Constantza on the western shore of the Black Sea for oil bunkers, oil being cheaper there than at any port on the direct route of the steamship. When off Constantza the steamship grounded on a sandbank, and the plaintiffs incurred expenses in refloating and repairing her which they alleged constituted a general average expenditure. By an average guarantee the defendants, in consideration of the delivery of the cargo to the consignees, guaranteed to the plaintiffs the payment of any contributions to general average in respect of the cargo. The consignees of the cargo having declined to pay general average contributions towards the said expenses on the ground that the steamship in calling at Constantza had deviated from the contract voyage, the plaintiffs brought an action against the defendants as guarantors for the amount of these contributions. It appeared by evidence that during the period of three and a quarter years preceding the date of the charterparty 25 per cent. of all oil-burning steamships sailing from eastern ports within to ports without the Black Sea had called at Constantza for oil bunkers:—

Held, by the Court of Appeal (Slesser and Clauson L.JJ., Greer L.J. dissenting), that by the express terms of the charterparty, which were clear and unambiguous, the voyage was a direct voyage by one route only from Poti through the Bosphorus; that the evidence did not suffice to prove a general commercial custom permitting a steamship sailing under such a charter to proceed on an alternative route via Constantza, and that it was inadmissible merely for the purpose of varying the written contract; that the steamship in proceeding to Constantza had made an unjustifiable deviation from the contract voyage; that the consignees of the cargo and the defendants as their guarantors were not, therefore, under any liability to make general average contributions towards the said expenses; and that the plaintiffs could not recover in the action.

Leduc & Co. v. *Ward* (1888) 20 Q. B. D. 475; *Glynn* v. *Margetson & Co.* [1893] A. C. 351; *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1902) 18 Times L. R. 374; and *Frenkel* v. *MacAndrews & Co., Ld.* [1929] A. C. 545 discussed.

Judgment of Goddard J. reversed.

APPEAL from the judgment of Goddard J. in an action tried by him in the Commercial Court.

By a charterparty dated September 1, 1933, and made between Messrs. Reardon Smith & Sons, Ld., shipowners (hereinafter called "the plaintiffs"), and the Anglo-Soviet Shipping Company, Ld., agents for the Manganese Export G.m.b.H. Berlin, as charterers, it was provided (inter alia) (clause 2) that the steamship should proceed with all convenient speed to Nicolaieff or Poti as ordered as per clause 39 and there load in the customary manner when where and as soon as ordered by shippers' agent a full and complete cargo of manganese ore, and being so loaded should with all convenient speed proceed to Istanbul and thence to one or other of certain ports in the United States of America and there deliver the same; (clause 3) that freight should be rate of 13*s*. 9*d*. per ton delivered; (clause 12) that the steamer was to be addressed for the custom house business to charterers or their agents at ports of loading; (clause 20) that the usual dangers and accidents of the seas were excepted, and that the steamer had liberty to call at any port or ports in any order or places to bunker or receive and/or deliver part cargo and/or passengers or to deviate for the purpose of saving life or property; (clause 28) that at Nicolaieff or Poti the steamer was to be consigned to the Odessa freight office or their agents " Sovflott Nicolaieff " or " Sovflott Poti " for loading or custom house business; (clause 34) that the charterparty should be valid for three steamers, each to be in loading port and ready to load, the first from October 1 to 18, or at charterers' option to October 20, the second from November 1 to 15, and the third from December 1 to 15, and the owners were to nominate the steamer for each month at least twenty days before the lay-days commenced and were to declare its exact position; (clause 39) that orders for port of loading should be given at Istanbul within six working hours from handing in by the captain of notice of arrival at Istanbul; (clause 41) that the owners were not to be called upon to take bunkers from charterers; and (clause 43) that general average should be payable according to York–Antwerp Rules, 1924, and should be adjusted in London in accordance with English law and custom; and that guarantee for cargo's liability for general average contribution and/or salvage charges should be given by Messrs. Black Sea and Baltic General Insurance Company, Ld.

The last of the three steamers which was to sail under the charterparty, that is to say the steamer which was to sail in December, was called the *Indian City*, and when nominated was at Genoa.

When that steamer arrived at Istanbul the charterers through their agents nominated Poti as her loading port.

The relevant bill of lading, which was dated in Poti on December 31, 1933, stated that there was shipped upon that steamship then lying at Poti and bound for Sparrow's Point, Maryland, U.S.A., a quantity of manganese ore said to weigh 8430 tons to be delivered at the latter port to the consignees or their assigns, they paying freight for the goods, and all other clauses, conditions and exceptions as per the charterparty.

The *Indian City*, which could burn either coal or oil, having shipped her cargo at Poti, proceeded from that port for Constantza to bunker.

On January 3, 1934, off the harbour of Constantza the steamship grounded on a sandbank and suffered damage.

For the common safety of the steamship, her cargo and freight, salvage services were rendered and some part of the cargo was jettisoned.

On January 8, 1934, the steamship was refloated and proceeded into the harbour at Constantza, where temporary repairs were effected and bunkers taken.

The plaintiffs alleged that by reason of these matters they had paid or incurred expenses constituting a general average sacrifice, salvage charges, and special charges on cargo.

By an average guarantee dated January 15, 1934, the Black Sea and Baltic General Insurance Company, Ld. (hereinafter called " the defendants "), in consideration of the delivery of the cargo to the consignees thereof against signature of a Lloyd's average bond without payment of a deposit, thereby guaranteed to the plaintiffs the payment of any contribution to general average and/or salvage and/or special charges which might thereafter be ascertained to be properly due in respect of the cargo.

By an instrument in writing dated March 5, 1934, signed by the defendants, they admitted a certain specified loss of freight as a general average loss.

On March 6, 1934, the steamship was again ready for sea.

By an agreement contained in letters dated in March, 1934, between the plaintiffs and the defendants it was agreed that the cargo should be delivered at Antwerp or Rotterdam on terms there set out, and otherwise in accordance with the terms and conditions of the charterparty.

Pursuant to the last mentioned agreement the cargo was carried in the steamship to Rotterdam and there discharged and delivered to and received by N.V. " Walsum " Handels en Transport Maatschapii, the indorsees of the bill of lading, who signed a Lloyd's average bond therefor.

By a Lloyd's average bond dated April 20, 1934, and made between the plaintiffs of the first part and the several consignees of cargo on the steamship of the second part, it was provided that the plaintiffs would deliver to the consignees or to their order their respective consignments on payment of the freight payable on delivery; and the consignees severally and respectively thereby agreed that they would pay to the plaintiffs the proper and respective proportion of any salvage and/or general average and/or particular and/or other charges which might be chargeable upon their respective consignments; and further that a sum deposited in a bank by the consignees should be held as security for and upon trust for the payment to the parties entitled thereto of the charges payable by the consignees respectively, and subject thereto upon trust for the depositors respectively: the statement being added after the signatures of the parties to the bond that it was without prejudice and with reservation to cargo owners' right to indemnity if and when unjustified deviation was proved.

By a letter dated April 21, 1934, from the defendants to the plaintiffs the defendants agreed, in consideration of the plaintiffs delivering the whole of the cargo to the receivers and refraining from exercising their lien for the balance of freight withheld by the receivers, to pay a specified sum into a bank for the joint account of the plaintiffs and the defendants.

On May 4, 1934, the defendants did so pay that sum into the bank, and in October, 1934, the defendants authorized the payment out to the plaintiffs of a part of that sum, leaving a sum due to the plaintiffs as balance of freight.

On October 22, 1935, the plaintiffs brought the present action against the defendants on their guarantee for the amount due in respect of the cargo's contribution to general average, and for balance of freight.

The plaintiffs in their points of claim stated the facts above mentioned, and further stated in effect (para. 2) that in pursuance of the contract of affreightment the steamship proceeded with her cargo from Poti to Constantza for bunkers en route for Sparrow's Point; (para. 4) that by reason of the grounding, salving, refloating and repairing of the steamship the plaintiffs had suffered certain damage and had paid or incurred certain expenses constituting a general average sacrifice, loss and expenditure, and salvage charges and special charges on cargo to all of which the cargo's contribution amounted to 6986*l.* 5*s.* 5*d.* as set out in an average statement made according to the York-Antwerp Rules, 1924, and dated September 11, 1935; (para. 8) that no part of the cargo's said contribution had been paid to the plaintiffs and that the defendants had refused to pay it to them; (para. 11) that the payment out in October, 1934, of part of the sum deposited in the bank as above mentioned left the sum of 1061*l.* 14*s.* 4*d.* due and owing to the plaintiffs as balance of freight. And the plaintiffs claimed:—Under para. 8: (i.) A declaration that the defendants were liable to pay to the plaintiffs the contribution due from the cargo towards the general average sacrifice, loss, expenditure, salvage and special charges on cargo; (ii.) Payment by the defendants of the contribution due from the cargo amounting to 6986*l.* 5*s.* 5*d.* and any interest accrued thereon. Under para. 11: (i.) A declaration that the sum of 1061*l.* 14*s.* 4*d.* in the bank be realized and paid out to the plaintiffs together with any interest accrued thereon; (ii.) Interest thereon.

The defendants in their points of defence and counterclaim stated (para. 2) that they specifically denied that the *Indian City* proceeded from Poti to Constantza in pursuance of the contract of affreightment; and that in proceeding to Constantza she deviated from the contractual voyage; (para. 3) that the defendants made no admissions as to (inter alia) the expenses stated to have been incurred by the plaintiffs, or as to the cargo's contribution thereto, amounting to 6986*l.* 5*s.* 5*d.*; (para. 5) that subject to the counterclaim the defendants admitted that 1061*l.* 14*s.* 4*d.* was due to the plaintiffs in respect of balance of freight; (para. 6) that the deviation of the *Indian City* displaced the contract of affreightment contained in the charterparty; and that the defendants were not liable to pay the contribution claimed or any contribution from the cargo towards the alleged general average sacrifice, loss, expenditure, salvage and special charges on cargo; (para. 7) that the defendants further said that their liability, if any, under the instrument dated January 15, 1934, did not arise until the consignees of the cargo had made default in payment to the plaintiffs under the Lloyd's average bond of the general average contribution and special charges on cargo, if any, properly due from them in respect of the cargo; and that such consignees had not made default, and that the points of claim in so far as they related to the plaintiffs' claim for general average contribution and special charges on cargo disclosed no cause of action; and (para. 9) that by way of counterclaim the defendants repeated their foregoing allegations and said that in breach of the contract evidenced by the bill of lading, charterparty and letters, and/or in breach of their duty as carriers for reward the plaintiffs failed to deliver the cargo at Rotterdam and delivered the same short to the extent of the quantity jettisoned at Constantza, being of the value of 1061*l.* 14*s.* 4*d.*; and that the defendants counterclaimed: (i.) A declaration that they were entitled to have the sum of 1061*l.* 14*s.* 4*d.* deposited by them in the bank released to them by the plaintiffs, together with any interest accrued thereon; (ii.) Interest thereon.

The plaintiffs in their points of reply and defence to counterclaim stated: (para. 2) that they expressly denied that in proceeding from Poti to Constantza the *Indian City* deviated from the contractual voyage; that the charterparty provided: "Steamer has liberty to call at any port or ports "in any order or places to bunker"; and that in proceeding to Constantza the steamship was performing the voyage agreed in the charterparty and/or bill of lading; (para. 3) that further or in the alternative the steamship by so proceeding for the purpose of bunkering was carrying out the voyage agreed in the charterparty or bill of lading in a business sense and/or was carrying out the voyage by a natural and usual and/or customary route for vessels laden at Black Sea ports, including eastern Black Sea ports, and proceeding thence on ocean voyages; (para. 4) that further or in the alternative under the charterparty the charterers, who at all material times were the owners of the cargo, had the option of ordering the steamship on her arrival at Istanbul to proceed either to Nicolaieff or Poti to load; that it was therefore necessary for the plaintiffs to arrange for bunkering the steamship after loading, as, in case she should be ordered to Poti, as she in fact was, there was too little depth of water at that port to enable her to bunker before loading, and also, to take a full and complete cargo of ore; that further, in order to secure bunkers after loading, it was necessary to arrange for them before the arrival of the steamship outward bound at Istanbul for orders, because the time available thereafter would in the ordinary course be insufficient to secure supplies; that further Constantza was the nearest port to the direct navigational route from Poti homewards at which oil bunkers were normally to be obtained; that the plaintiffs accordingly made arrangements before the steamship arrived at Istanbul and received the said orders from the charterers or their agents for her to bunker at Constantza after loading, as they were entitled in the premises to do; and that in the premises the steamship by proceeding to Constantza was carrying out the voyage agreed in the charterparty and/or bill of lading and/or was carrying out the voyage by a route contemplated and/or agreed by both the parties thereto; (para. 5) that further or alternatively the charterers, before or at the time the steamship loaded her cargo or alternatively sailed from Poti, well knew and had notice that she was to proceed to Constantza to bunker and assented to and/or acquiesced in her so doing; that by way of particulars of notice to the defendants and of their assent and/or acquiescence, the plaintiffs repeated the matters alleged in para. 4 hereof, of which the charterers were at all material times well aware; that further the *Indian City* was the last of three steamships all belonging to the plaintiffs which loaded under the said charterparty, the first of these steamships, the *Atlantic City*, having been ordered by the charterers to and loaded at Poti, and the second, the *Jersey City*, at Nicolaieff; that all these steamships were addressed to the charterers' agents, Sovflot or Sovftorgflot, at the said loading ports under the charterparty; that prior to the commencement of the loading of the *Atlantic City* at Poti, and of the *Jersey City* at Nicolaieff, the captains of the same informed the charterers' said agents at these loading ports that they intended to bunker at Constantza, and before sailing each of the captains instructed the agents to cable to his agents at Constantza and to the suppliers of oil bunkers at that port to advise his arrival for bunkers at that port, which the said agents accordingly did; that prior to the commencement of the loading of the *Indian City* at Poti her captain also informed the charterers' said agents that he intended to take bunker oil at Constantza and, prior to sailing, he instructed the charterers' said agents to cable his agents at Constantza and to the suppliers of oil bunkers at that port to advise his arrival for bunkers at that port, which these agents accordingly did; and that both the *Atlantic City*, and the second of the three steamships, the *Jersey City*, in fact bunkered at Constantza after sailing from the said loading ports under the charterparty, as the charterers well knew; (para. 6) that further or alternatively the charterers well knew that the route followed by the *Indian City* was a natural and usual and/or customary route for vessels laden at Black Sea ports, including eastern Black Sea ports, and proceeding thence on ocean voyages; (para. 7) that further or alternatively the defendants, by reason of the matters set out in paras. 5 and/or 6 hereof, were estopped from asserting that, in proceeding to Constantza the steamship was deviating from the voyage agreed upon under the charterparty and/or bill of lading, or from denying that in so proceeding the steamship was performing the voyage; and by way of defence to counterclaim the plaintiffs said (para. 8) that they denied that either the defendants or the charterers were in any event entitled to counterclaim in respect of the jettisoned cargo; and (para. 9) that alternatively the plaintiffs repeated paras. 2 to 7 hereof; and that the cargo was lost by dangers or accidents of the seas and/or by jettison, and the plaintiffs were not liable for the said loss or any part thereof by reason of the provisions of the charterparty or bill of lading.

On March 16, 17, 18, and 22, 1937, the action was tried by Goddard J. without a jury.

Evidence was brought on behalf of the parties respectively in support of the allegations of fact in their pleadings. In particular, evidence was given on both sides in regard to the number of oil-burning steamships sailing from Poti or Nicolaieff to ports beyond the Black Sea which called at Constantza for oil, and the circumstances in which they did so, and the substance and effect of that evidence is stated below in the judgments of the Lords Justices.

C. A.
1938

REARDON SMITH LINE, LD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO.

On March 22, 1937, Goddard J. gave judgment, holding that the steamship in proceeding to Constantza to take in oil bunkers did not deviate from her voyage, and that the plaintiffs were accordingly entitled to recover from the defendants the sums which they claimed for general average and freight. The judgment of the learned judge is shortly summarized below in the judgment of Greer L.J.

The defendants appealed.

G. St. C. Pilcher K.C., *H. G. Willmer* and *Norman V. Craig* for the defendants, appellants.

A. T. Miller K.C. and *Cyril Miller* for the plaintiffs, respondents.

[The arguments of counsel and the authorities chiefly considered appear from the judgments of the Lords Justices as set out below. The following additional cases were also cited: *White* v. *Granada Steamship Co.* (1); *The Dunbeth* (2); *Morrison* v. *Shaw, Savill & Albion Co.* (3); *United States Shipping Board* v. *Bunge y Born, Ld.* (4); *Sutro & Co. and Heilbut, Symons & Co., In re* (5); *A/S Rendel* v. *Arcos, Ld.* (6); *Panoutsos* v. *Raymond Hadley Corporation of New York* (7); and *United States Shipping Board* v. *Masters & Co.* (8)]

Cur. adv. vult.

1938. April 12. The following judgments were read:—

GREER L.J. The plaintiffs are the owners of a regular line of tramp steamships which go, amongst other places, to Black Sea ports. There are various ports in the Black Sea from which shipments are made and to which the plaintiffs have been in the habit of sending their ships. The ports most material for consideration in the present appeal are the ports of Poti, Novorossisk, and Eupatoria. Vessels sailing from these ports, to use a neutral word for the present, frequently

---

(1) (1896) 13 Times L. R. 1.

(2) [1897] P. 133.

(3) [1916] 1 K. B. 747; [1916] 2 K. B. 783.

(4) (1925) 31 Com. Cas. 118; 16 Asp. M. C. 429.

(5) [1917] 2 K. B. 348.

(6) (1937) 43 Com. Cas. 1, 18.

(7) [1917] 2 K. B. 473.

(8) (1923) 14 Ll. L. Rep. 208.

C. A.
1938

Reardon Smith Line, Ld. v. Black Sea and Baltic General Insurance Co.

Greer L.J.

during the years 1930 to 1933 called at Constantza on the eastern side of the Black Sea, if they were oil burners, to take in oil in bunkers at a place where the supply was abundant and cheap. Vessels from Odessa, Nicolaieff, and other ports at the northern end of the Black Sea also frequently called when they wanted oil at Constantza. If a bill of lading contract or a charterparty contract described the voyage from any of these ports as a voyage from a port of loading to a port of discharge beyond the Black Sea, then in ordinary circumstances none of those ships could have called at Constantza without their being liable to have it said of them that they were deviating from the voyage. The extent of the deviation would be different according to what the port of loading was, but in every case there would be some deviation from the geographical route. On September 1, 1933, the plaintiffs, who were the shipowners, agreed to charter their vessel to Messrs. Manganexport of Berlin. Manganexport was a company controlled by the Soviet Government through some one or other of the companies they had created in Russia. [His Lordship read the provisions of the charterparty above set out and continued as follows :] A great quantity of evidence was called to show that it was the regular habit during the three and a quarter years prior to the disastrous voyage which this Court has to investigate, and that very many ships had adopted the practice, of calling at Constantza for oil, though that port was not on the geographical line from the port of loading to the port of discharge, and that 25 per cent. of all ships loading cargo at Black Sea ports and burning oil had called at Constantza, and though it is clear to demonstration that this course of business must have been well known to all firms and companies interested in the Black Sea trade, no objection was ever taken by shippers or charterers to the vessels calling at Constantza. Unfortunately, the last of the three vessels, the *Indian City*, which sailed under the charterparty in question, went ashore at Constantza and suffered very considerable damage, some of the charterers' cargo also being sacrificed for the benefit of all the interests concerned. Owing to the expenses incurred by the plaintiffs a claim for general average arose by the ship against the charterers and all other interests concerned. The amount of that claim was rather more than 6000*l*. The plaintiffs in the event of their being successful in their action for the general average claim were admittedly also entitled to a sum of 1061*l*. 14*s*. 4*d*. which had been paid into Barclays Bank in joint names. The right of the plaintiffs to the last mentioned sum admittedly depended upon the result of their claim for general average. Both of these claims depend upon the question whether, when the ship went ashore at Constantza, she was deviating from her contractual voyage.

As between the charterers and the shipowners, the bill of lading was only a receipt for the goods, as the bill of lading had never been assigned by the charterers at the time when the vessel went ashore. The usual Lloyd's average bond was signed by the shipowners and the charterers. The shipowners, through their captain, were ready to give up their lien for general average on receiving a guarantee by the defendants, and such guarantee was given on January 15, 1934. It seems to me that the effect of the guarantee was merely to allow the guarantors to stand in the shoes of the interests concerned, and that, if at the date of the guarantee the charterers were under a liability to the shipowners, the defendants would have had to make good that liability.

It was contended, however, that the charterers were under no liability to the shipowners because the ship had deviated from her contract voyage. Whether she had or not depends partly upon the evidence, and partly upon the law as laid down in a number of cases. There is no room for dispute with reference to the facts proved. Mr. Pilcher, for the appellants, made certain calculations based upon the evidence given by affidavit and on commission with regard to the number of vessels that did call at Constantza, and I think he was right in saying that 75 per cent. of the oil-burning vessels went direct to the Sea of Marmora without calling at Constantza, but that 25 per cent., or a quarter of the total, called at Constantza and took oil bunkers there during the

C. A.
1938

Reardon Smith Line, Ld.
v.
Black Sea and Baltic General Insurance Co.

Greer L.J.

relevant time—namely, the three and a quarter years preceding the unfortunate stranding of the *Indian City*.

It was contended by Mr. A. T. Miller, on behalf of the respondents, that the evidence showed that all oil-burning vessels leaving Black Sea ports had, by reason of a long-standing practice, alternative routes which they might take, one direct without calling at Constantza, and the other indirect by calling at Constantza. The diversion from their direct route was much more serious in the case of vessels loading at Poti, vessels loading at Novorossisk, and vessels loading at Eupatoria, than for vessels loading at such ports as Odessa and the neighbourhood thereof. But there was, it seems to me, overwhelming evidence that it must have been well known to everybody connected with the Black Sea trade that oil-burning vessels when they desired to do so in practice sometimes went direct, and sometimes selected the route which, unless justified by the commercial practice, would have been a deviation involving, as it did, a call at Constantza, which was not on the direct geographical route to the port of discharge.

The question arising in the appeal is whether the learned judge was right in his conclusion that the vessel in proceeding to Constantza to take in oil bunkers did not deviate from her voyage. He says in the course of his judgment: "The "plaintiffs had for some time been running a fleet of chartered "steamers to the Black Sea; they were all ships capable of "burning either coal or oil. It was not until 1930 that they "sent ships in any number to the Black Sea, and they did "so because in that year they found that cheap oil was "available at Constantza for bunkering purposes. It was "then that they began to do business with the Russian "charterers, and the practice was for their ships, on leaving "the loading ports, which might be Nicolaieff, Novorossisk, "or Poti, to proceed first to Constantza and there bunker, "and thence continue the ocean voyage. So far as these "ports are concerned, there is no doubt that Constantza was "off the direct route to the Bosphorus," and the learned judge then says: "Now at this time," that is to say, at the time

C. A.
1938

REARDON SMITH LINE, LD.
v.
BLACK SEA AND BALTIC GENERAL INSURANCE CO.

Greer L.J.

when the *Indian City* sailed from Poti where she loaded, "not only the plaintiffs' ships, but oil burners belonging "to other owners were in the habit of bunkering at Constantza. "This is not surprising, as there was a large supply of cheap "oil available there." So far as the plaintiffs' ships are concerned, all but one of those which sailed from Poti bunkered at Constantza, and the learned judge says he came to the conclusion that it was proved that it had become a regular practice by the autumn of 1933 for oil-burning ships leaving the eastern ports to bunker at Constantza. In another part of his judgment he refers to the majority of the ships that sailed from Black Sea ports as sailing to Constantza, but this was a slip, as it was only one-quarter of the ships that did so call. He states his conclusion that he accepts the plaintiffs' case as showing that the *Indian City* was proceeding by a recognized or accustomed route which included a call at Constantza, and that there was, therefore, no deviation. And later he refers to the route via Constantza as a recognized trade route, which need not necessarily be the shortest sea track. The learned judge relied upon the law laid down in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1), as approved by the House of Lords in the decision in *Frenkel* v. *MacAndrews & Co., Ld.* (2), as showing that there may be in a business sense alternative routes which are practicable, and that either alternative route may be used by a ship without being liable to the penalties of deviation. I think the learned judge approached the question in the right way by asking himself, before considering the liberties in the charterparty, whether or not the route taken via Constantza was an ordinary trade route in a business sense. If it was, it was unnecessary then to consider whether the route so taken was within the liberties granted by the contract of affreightment. I have come to the conclusion that the learned judge was right in holding that when she grounded the *Indian City* was on a route generally recognized in the Black Sea trade as an alternative route to the direct route, and accordingly that the defendants were liable as standing in the shoes of the charterers. I find it impossible to suppose that the Soviet agents in the various ports who looked after the interests of the charterers knew nothing about this practice, or that they failed to communicate to their principal the fact that the various ships were in the habit of calling at Constantza.

---

(1) 18 Times L. R. 374.

(2) [1929] A. C. 545.

It remains for me to consider the various authorities that were relied upon on either side. The two most authoritative decisions on the question as to what effect is to be given to a bill of lading which describes a carrying voyage as from port of loading to port of discharge followed by a clause containing liberty to call at any port and in any order are the decisions of the Court of Appeal in *Leduc & Co.* v. *Ward* (1) and that of the House of Lords in *Glynn* v. *Margetson & Co.* (2) In both these cases it was held that in the absence of any evidence which would show that commercially the vessels of the line in question were in the habit of calling at certain ports, the description of the voyage must be held to have a geographical meaning—namely, that the vessel is bound to go direct from the port of loading to the port of discharge, and that, where liberty to call at any ports in any order is reserved to the ship in the bill of lading, that means any ports which are in a business sense so near to the geographical line as to prevent calling at those ports from being deemed a diversion. The headnote of *Leduc & Co.* v. *Ward* (1) is as follows: "The plaintiffs having purchased goods to be "shipped from a foreign port on the terms that payment of "the price was to be made in exchange for shipping documents, "the bill of lading signed upon the shipment of the goods "was, upon payment of the price, indorsed to them. The bill "of lading, which contained the usual exception of sea perils, "stated that the goods were shipped for delivery at Dunkirk "on board a vessel lying at Fiume and bound for Dunkirk, "with liberty to call at any ports in any order. The ship, "instead of proceeding direct for Dunkirk, sailed for Glasgow, "and was lost, with her cargo, off the mouth of the Clyde, "by perils of the sea. In an action brought by the plaintiffs

---

(1) 20 Q. B. D. 475.

(2) [1893] A. C. 351.

C. A.
1938
REARDON SMITH LINE, LD.
v.
BLACK SEA AND BALTIC GENERAL INSURANCE CO.
Greer L.J.

"against the shipowners for non-delivery of the goods, evidence "was given to show that the shippers of the goods, at the "time when the bill of lading was given, knew that the vessel "was intended to proceed via Glasgow:—Held, that such "evidence was not admissible to vary the terms of the bill of "lading, which imported a voyage direct from Fiume to "Dunkirk, subject to the liberty to call at any ports of call "substantially within the course of such voyage; that "Glasgow, being altogether out of the course of such voyage, "was not such a port; and that the vessel was therefore lost "while deviating from the voyage contracted for, and the "excepted perils clause did not exonerate the defendants "from liability in respect of non-delivery of the goods." *Glynn* v. *Margetson & Co.* (1) was to the same effect, but it has the higher authority of being a decision of the House of Lords. It is, however, worth while noting that ir a book of high authority, Arnould on Marine Insurance (11th ed.), sect. 60, at p. 85, the law is stated as follows: "In the same way it is a general usage of maritime trade, "incorporated as we have seen into all policies, that the ship, "in the absence of any express permission on the face of "the policy to do otherwise, shall pursue a direct course "between the two termini of the voyage, without stopping "at any intermediate places; if, however, it be the notorious "and well-settled usage of any given trade to stop at certain "interjacent ports, this usage of the particular trade would "doubtless countervail the general maritime usage, and the "stopping at such ports, although not authorised by any "express clause in the policy, be deemed no deviation." The question as to whether a departure from the direct route supported by a general practice of the line on which the goods were shipped was a deviation arose in a case tried in Liverpool before Wills J., *Evans, Sons & Co.* v. *Cunard Steamship Co.* (2) That was a case like *Glynn* v. *Margetson & Co.* (1) in its facts, but different from *Glynn* v. *Margetson & Co.* (1) by reason of the evidence that was given that the Cunard Line had two usual

---

(1) [1893] A. C. 351.

(2) 18 Times L. R. 374.

C. A.
1938

Reardon Smith Line, Ld. v. Black Sea and Baltic General Insurance Co.

Greer L.J.

routes; about 50 per cent. of their vessels that shipped goods at Bari went direct from there to the port of destination, but the other 50 per cent. went by a roundabout route through the Mediterranean, calling at other ports before setting steam direct for Liverpool. The case was a case which fell to be determined as between the indorsee of a bill of lading on the terms of the bill of lading, the bill of lading holder being in the same position as he was in *Glynn* v. *Margetson & Co.* (1), not being bound by the knowledge and assent of the shippers. In distinguishing *Glynn* v. *Margetson & Co.* (1) Wills J. said: "There was no evidence as there is in this case that the only "practicable way to get a cargo from Bari to Liverpool is "by a more or less uncertain route via the Adriatic round "by Levantine or Black Sea ports, but, if that is the only "voyage practicable, that must be the voyage in the business "sense agreed upon." It is to be observed that the learned judge's description of the indirect voyage as the only practicable way is inaccurate, because it seems to mean the only practicable way as understood by the shipper, and the bill of lading holder was not bound by what was known to the shipper as the only practicable way in which goods could be shipped on a particular boat on which they were put. I think the decision must be taken to be a decision that if the way the vessel in fact sailed was one of the practicable ways in which the bill of lading contract could be performed, then it was open to the defendants to contend that there were two routes, one direct, and the other a route well known in the fruit trade in the Mediterranean as a route which might be taken by any vessel shipping goods at Bari. Understood in this sense, it seems to me to agree with the proposition I have stated from Arnould on Marine Insurance, and with what the Court of Appeal decided in *Frenkel's* case. (2) It is plain to me that each member of the Court of Appeal decided that case upon the assumption that Malaga was the port of loading and Liverpool the port of discharge, and not on the alternative view that there was no port of loading mentioned in the bill of lading. In the

(1) [1893] A. C. 351.

(2) (1928) 31 Ll. L. Rep. 92.

course of his judgment in that case, which was an action by the original shipper, as it is in the present case, Scrutton L.J. said (1): "This case is a case where the shipper, at "the time he puts goods on board, knows that he is shipping "by a line which from Malaga may have two ordinary routes. "He may be shipping on a vessel of the line which is going "to England 'via Levante,' or he may be shipping on a vessel "of the line which is going from Malaga direct, and he is told "before he ships, by advertisements and by shipping cards "left at his office, that the vessel is going 'via Levante.' . . . . "That appears to me to be the simplest case of a vessel with "a bill of lading destination London going by the ordinary "routes by which that line goes to London, and going when "the shipper has been told before he ships that she is going "by one of the ordinary routes." It is, I think, if I may humbly say so, put more clearly by myself in my judgment, and even more clearly by Sankey L.J. in his judgment. I say (1): "Now the material facts appear to me to be these. "For a considerable time—some years—the defendants have "been pursuing from Malaga to Liverpool or other parts of "this country, or to Hamburg, two distinct routes for the "vessels of their line, one 'via Levante,' which means going "north-east up the coast of Spain, calling at various ports "and then coming back from the furthermost port down the "Mediterranean and through the straits to this country, and "the other coming direct from Malaga after they have been "up to the higher ports, direct from Malaga to ports in this "country"; and later on I say: "We have not got to "consider the effect of the deviation clause until we have "found out, first, what the route was. Then you may have "to ask yourself the question as to whether from that agreed "route there was a deviation." Giving his judgment Sankey L.J. (2), after referring to the pleadings, says: "Now in this "case there was abundant evidence that the vessel proceeding "in a northerly direction towards Cartagena was proceeding "upon one of the usual routes. . . . . So on the first point "there was really evidence all one way as to the route taken

---

(1) 31 Ll. L. Rep. 94.

(2) Ibid. 95.

C. A.
1938

REARDON SMITH LINE, LD.
v.
BLACK SEA AND BALTIC GENERAL INSURANCE CO.

Greer L.J.

"by the vessel being one of the usual routes; and therefore, "in my view, she was proceeding upon the agreed voyage"; and later on he says (1): "Therefore, there was evidence "that it was the usual route, or a usual route, and that the "plaintiff well knew it." It does not seem to me to matter whether the plaintiff knew it or did not know it if it was in fact a usual route, because once it is established that it is a usual route it is unnecessary to go further and decide whether the charterer or shipper knew it. In *Frenkel's* case in the House of Lords (2) the learned Lords deal with two questions. Most of their Lordships thought that the plaintiff's appeal failed because there was no description in the bill of lading or the charterparty of the commencement of the chartered voyage, and they also dealt with the question which the Court of Appeal alone had dealt with—namely, that it had been established that the route "via Levante" was a usual commercial route for the ship to follow. In the course of his speech Lord Buckmaster (3) refers to the two well known routes and says: "The customary route is one of two routes, "and the figures showed, as to the different voyages, that the "one was nearly as customary as the other." In the course of his speech Viscount Dunedin said: "There may be, in "my view, either alternative routes or a customary route "which in either case might displace the geographical route." He cites with approval the words of Wills J. in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (4), who, in distinguishing *Glynn* v. *Margetson & Co.* (5) from *Frenkel's* case (2), pointed out that there was no evidence as in *Frenkel's* case (2) that the only practicable way to get a cargo from Bari to Liverpool was by Levantine or Black Sea ports. As I have pointed out, the words should have been that there are two practicable ways in a business sense of getting the cargo from Bari to Liverpool, one direct, the other via Levantine or Black Sea ports. Viscount Sumner points out (6) that the voyage via Levante was shown to be a usual commercial route for the *Cervantes* to follow under the circumstances. He says (6):

---

(1) 31 Ll. L. Rep. 95.
(2) [1929] A. C. 545.
(3) Ibid. 545, 550, 557.
(4) 18 Times L. R. 374.
(5) [1893] A. C. 351.
(6) [1929] A. C. 561.

"I cannot see that it is the less a reasonable and usual "commercial route, though the evidence referred only to the "ships of the respondents' own line. Their prominent position "in this trade, the number of ships they run, and the length "of time that this kind of practice has been followed by them "all go to prove this conclusion." The same learned Lord makes some valuable observations (1) with regard to the modification of strict documents by alterations in the practice of merchants and steam shipowners. In referring to *Glynn* v. *Margetson & Co.* (1) Lord Sumner says (2): "Lord Esher mentions "various circumstances as to season and safety that may be "material. It would have been enough for the decision to "have said 'Malaga to Liverpool is not Malaga to Burriana "'and back to Liverpool.' The mention of other matters, "all of them depending on facts relating to the circumstances "of trade and navigation and varying somewhat as time "goes on and progress takes place, really shows how clearly "these great authorities desired to guard themselves in view "of the fact, that on many grounds deviation from the sea "track might still not be beyond the ordinary route, though "in the case in hand they had not been put in evidence. "Such things must be matters of degree and may not always "be equally important for all classes of ships, all kinds of cargo, "or all periods of trade." The learned Lord then refers with approval to the decision of Wills J. in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (3) Lord Warrington of Clyffe treats the case as one of ambiguity consisting of a latent defect which only appeared when the evidence was given, that is to say, he treats the case as one in which the description is a description of a voyage from Malaga to Liverpool, and the evidence showed that there were two routes to which that description might be applied, one direct, the other a recognized commercial route going many hundreds of miles further than the direct route, and in explaining *Evans, Sons & Co.* v. *Cunard Steamship Co.* (3) he explains that what is meant by "practicable" is "clearly practicable in a commercial sense."

(1) [1893] A. C. 351.
(2) [1929] A. C. 563.
(3) 18 Times L. R. 374.

The evidence in the present case showed that all the plaintiffs' oil-burning vessels, except one starting from Poti, went direct to Constantza, took in their oil there, and then went on to the Sea of Marmora. This took them about a day's steaming beyond what they would have taken if they had gone direct to the Sea of Marmora, but, on the other hand, by only having on board a sufficient quantity of oil to take them to Constantza, and when at Constantza only taking sufficient oil to take them to Constantinople, they were leaving room in their vessels for more cargo to be put in their ships at Poti, though in the particular instance of the sailing of the *Indian City* this point may have been immaterial, as there appears to have been plenty of room for more cargo without trespassing on the space reserved for bunkers. The plaintiffs put in evidence before Goddard J. a number of affidavits by captains employed in various ships of different nations which satisfy me that every one engaged in the trade knew perfectly well that both from Poti, from Novorossisk, from Eupatoria, and from the northern ports including Odessa, there had been established as a usual commercial route a voyage first to Constantza with a rest there to take in oil, and then a resumption of the voyage to the Sea of Marmora, and that this was a well recognized usual route for vessels to take during the material years, as to which evidence was called, in their voyage from Black Sea ports to Constantinople and ports beyond.

To prove a commercial or business practice showing an alternative recognized route, it is not necessary to show that the alternative route was taken by a majority of steamers leaving the port of loading. It is sufficient if it be taken by a substantial percentage of the voyages from the loading port. The decisions of the Court in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1), and *Frenkel's* case (2), did not turn on the fact that the practice had been followed in so large a percentage as 50 per cent. In my judgment, the practice, to be binding, may be proved by a less percentage than 50 per cent., and I can well conceive that a practice followed in only 25 per cent.

(1) 18 Times L. R. 374.
(2) [1929] A. C. 545.

of all ships may be more convincing than one followed by 50 per cent. of ships of one line. In the present case, according to the affidavits relied on by the respondents, the 25 per cent. consisted of ships of a variety of ownership and nationality, and it must have become well known, not merely to shipowners, but also to the charterers and shippers' agents who represented the German company and the Soviet in all the ports in the Black Sea. It is, to my mind, more convincing than it would have been if it had been only established as the practice of 50 per cent. of the ships of one line. I feel that it is indisputable that the destination of these ships via Constantza must have been known to all who were interested in the Black Sea trade, and it is to me unbelievable that the charterers did not from time to time receive from their agents information about the alternative route that was being followed by so many ships belonging to so many owners of different nationalities. The defendants as guarantors can stand in no better position than the charterers who still were the only contracting parties at the date of the guarantee. In any event, without considering any question of estoppel, the alternative route, if established by evidence, would be one that any ship could follow without having to rely on any special liberty reserved by a contract of affreightment. It would not be a deviation, and would never require justification by a special liberty clause. Such a clause is only required in respect of a route which has not been established as a usual commercial route. In these circumstances, I think the effect of the cases is that we need not deal with the question as to the meaning of the liberty clause in the charterparty, or with the question of estoppel which was raised by Mr. Miller.

It was suggested in the course of the argument that no weight should be attached to the evidence contained in the affidavits, as the deponents did not, except in one case, attach copies of the contracts of affreightment so as to show there was no special term therein giving express liberty for the particular ship to call at Constantza. In my judgment, no weight should be attached to this argument. A long acquaintance with charterparties and bills of lading with regard to

C. A.
1938

Reardon Smith Line, Ld. v. Black Sea and Baltic General Insurance Co.

Greer L.J.

shipments from all Continental ports satisfies me that there is a high degree of probability that in all the cases mentioned in the affidavits the liberty to call at ports was in the usual form in which we find it in the defendants' charterparty. Further, I think we are bound to treat the deponents as honest men, and if when they swore their affidavits they knew that there was a special clause in their contract of affreightment expressly entitling the ship to call at Constantza, they would have been guilty of that form of dishonesty known as suppressio veri. I do not believe they were so guilty, nor do I think that, if there were such a clause in a charterparty which the deponents had not seen, their owners would have failed to inform their captains of the existence of such a liberty.

It was contended by Mr. Willmer in his reply that the evidence contained in the affidavits was not admissible, inasmuch as it was inconsistent with the meaning of the words contained in the charterparty. I think it is too late to apply the doctrine of *Leduc & Co.* v. *Ward* (1) to a case like the present. If the evidence be inadmissible in the present case, it would have been inadmissible in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (2) and in *Frenkel's* case. (3) In *Evans, Sons & Co.* v. *Cunard Steamship Co.* (2) it was admitted and given effect to by Wills J., and his decision was approved in the speeches of the Lords in *Frenkel's* case. (3) If the contention is right, the decision of the Court of Appeal in *Frenkel's* case (3) was wrong, as they decided the case entirely upon evidence which is said to be inadmissible, and it is quite clear that they treated the case as one in which the terminus a quo and the terminus ad quem were both mentioned. One of the reasons for the decision of the House of Lords was that the terminus a quo was not mentioned, but they also, as I have pointed out, treated the case as one in which they would have to come to the same decision if the terminus a quo had been mentioned. Warrington L.J. held that although there was no ambiguity in the words themselves, there was a latent ambiguity which arose out of the evidence that 50 per cent. of the respondents' ships went one way and 50 per cent. the other way, and that this ambiguity was a matter to be determined by evidence as to what the parties really meant. I think the respondents' argument should not succeed, notwithstanding the view that will be expressed to the contrary by my brethren.

---

(1) 20 Q. B. D. 475.
(2) 18 Times L. R. 374.
(3) [1929] A. C. 545.

I think the learned judge was right for the reasons he gave, and that this appeal should be dismissed with costs.

SLESSER L.J. The facts of this case have been fully stated by Greer L.J.

The voyage in question is defined in a charter-party between the plaintiffs and the cargo owners dated September 1, 1933, which is incorporated in a bill of lading of December 31, 1933. The charterparty provides in clause 2 that the ship shall proceed with all convenient speed to Nicolaieff or Poti as ordered under clause 39, which provides that orders for port of loading shall be given at Istanbul within six working hours from handing in by the captain of notice of arrival at Istanbul—in fact Poti was ordered—and there load a cargo of manganese ore, and being so loaded shall with all convenient speed proceed to various named American ports at charterer's option, orders, unless previously given, to be declared on steamer passing Gibraltar. Sparrow's Point in the United States of America was ordered.

The voyage therefore here to be considered was, so far as its termini are to be regarded, Poti to Sparrow's Point. The only material liberty is in clause 20, to this effect: "Steamer has liberty to call at any port or ports in any order "or places to bunker."

In my judgment, this charterparty in the matter of the voyage on the language which I have quoted is unambiguous; there is, in the language of Lord Esher M.R. in *Leduc & Co.* v. *Ward* (1), only one voyage mentioned "from the port of "shipment to the port of destination, ... a voyage on the "ordinary track by sea of the voyage from the one place to "the other," and any departure from that contract in the absence of exempting necessity would be a deviation. Now

---

(1) 20 Q. B. D. 475, 481.

C. A.
1938
Reardon Smith Line, Ld. v. Black Sea and Baltic General Insurance Co.
Slesser L.J.

the ordinary practicable sea track from Poti in order to pass through the Black Sea lies substantially in a line from Poti to the Bosphorus. This case is thus distinguishable from *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1), for here no question of impracticability of using one ordinary direct route arises. The question arises whether the actual course pursued by this ship to go from Poti to Constantza, a port on the west side of the Black Sea, and considerably north of the Bosphorus, involving approximately a whole further day in steaming, can be held in the circumstances of this case to be the contracted voyage.

The first, and perhaps decisive, question to be considered is whether there is any room for the sort of evidence which was before the learned judge which might be construed so as to vary the obligation to proceed along the ordinary commercial sea track.

In my opinion, on the authorities, once it is held that the voyage provided is a direct route, no evidence of an agreement to the contrary can be considered: per Lord Wensleydale in *Grey* v. *Pearson.* (2) In the recent case in the House of Lords, *Frenkel* v. *MacAndrews & Co.* (3), Lord Buckmaster said (4): "If .... the fair construction of the bill of lading is that the "route was direct to Liverpool, the appellant would be entitled "to succeed, for an agreed term in a bill of lading must prevail "over an agreement contrary to its terms." He cites with approval the case of *Leduc & Co.* v. *Ward* (5), to which I have already referred, and the decision of the House of Lords in *Glynn* v. *Margetson & Co.* (6), and distinguishes that case from *Frenkel's* case (3) on the ground that in the latter there was ambiguity as to the route to be followed. As to *Margetson's* case (6) and *Leduc's* case (5), he says (7): "So far as the "principle laid down in these cases is concerned it is, to "my mind, this, that the route of a vessel declared to be "lying at one port and bound for another must be construed "as a direct route." So also Lord Sumner points out (8)

(1) 18 Times L. R. 374.
(2) (1857) 6 H. L. C. 61.
(3) [1929] A. C. 545.
(4) Ibid. 550.
(5) 20 Q. B. D. 475.
(6) [1893] A. C. 351.
(7) [1929] A. C. 545, 552.
(8) Ibid. 562.

that the authority of *Margetson's* case (1) is "unquestionable, "but the limits of the decision are also clear. The termini "of the bill of lading voyage were expressly stated." He also comments on the fact that in *Frenkel's* case (2) the words "with destination Liverpool" is not enough to show the terminus of the ship's voyage. Lord Warrington says (3) that the word "route" was, in *Frenkel's* case (2), an ambiguous word and continues: "Parol evidence would then be "admissible to prove in which of these two senses it was "used by the parties to the contract."

I do not think it necessary in this case further to consider the problem at any length. Once the conclusion is arrived at that the essential words, "being so loaded" (at Poti) "shall with all convenient speed proceed to Sparrow's Point" are identical in tenor with the words "lying at—and bound "for," as I think they are, there can be no question but that in the absence of a proved trade custom in the strict sense they completely define the object and intention of the contract.

Mr. Miller, for the respondents, did not attempt to set up such a custom. Indeed, on the evidence, it would not have been possible for him so to do. A custom to add a term to the contract can only be introduced into the contract by showing that, being a custom of the trade, it is presumed that a contract made by persons in that trade was intended to incorporate it, the presumption being that it is known to persons who engage in that trade; but it must be definite and uniformly adopted and certain. It must be uniform as well as reasonable; and must have quite as much certainty as the written contract itself: per Jessel M.R. in *Nelson* v. *Dahl.* (4) Now here, at the highest, of twenty-two oil-burning ships, the evidence is that only nine went to Constantza after loading at Poti bound for places beyond the Black Sea, and of these, three went to complete their cargo, so that only six proceeded direct to Constantza to bunker, and all but one belonged to the plaintiffs. This was in the material years 1932 and 1933. There being then no possible evidence of general trade custom, I can find no other factor to take the case out of the plain words of the charterparty, except by the consideration of evidence which I consider not to be admissible. That evidence goes to show that during material times, owing to the cheapness of oil at Constantza, all the plaintiffs' vessels, and about a quarter of the whole of the oil-burning vessels bound for the Bosphorus from Black Sea ports, were bunkered at Constantza, though the liberties in charters other than in the case of one vessel beyond the plaintiffs' ships were not considered.

---

(1) [1893] A. C. 351.
(2) [1929] A. C. 545.
(3) Ibid. 567.
(4) (1879) 12 Ch. D. 568, 575; affirmed nom. *Dahl* v. *Nelson* (1881) 6 App. Cas. 38.

It might well have been on this evidence, had the charter been ambiguous, that this could rightly have been held to be, in the language of Lord Sumner, " a usual commercial " route," and it is upon this assumption that the learned judge has proceeded; but he has come to his conclusion, in my opinion, by ignoring the salutary rule that when the words are in their literal meaning unambiguous, and when such meaning is not excluded by the context and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words. In the present state of the authorities, in the absence of proved custom, a charter providing, without qualification, for a direct voyage must be taken to refer to the ordinary track by sea of the voyage from the one place to the other ; it may be otherwise if there are alternative sea routes or where, on the facts, it is found that the only practicable route is not the direct one. This view also excludes any possibility of any reliance upon the liberty to bunker in this case, for it cannot be suggested that, if the voyage be direct from Poti to the Bosphorus, that Constantza can be a port at which there is liberty to call.

Finally, it is argued that the defendants have waived any right which they might otherwise have to contend that this ship was not in the course of her voyage at the time of the casualty. The learned judge has not accepted that view, which depends upon the fact that the evidence goes to show that a person apparently acting for the charterers at Poti was informed by the captain, in answer to his request that the captain should take on coals at Poti, that the captain would go to Constantza to bunker for oil. Such information given to the charterers' agent cannot, to my mind, support any possible waiver or estoppel. There is no evidence of the intention of the parties to vary the contract, nor did the plaintiffs, on being so informed, act in any way to their detriment. In the language of Bankes L.J. in *Malmberg* v. *Evans & Co.* (1): "It is quite consistent with what constantly "and ordinarily happens in business, that one or other party "to a contract does not insist on a strict compliance with "its terms and is content that the other party shall perform, "perhaps not strictly, but still perform, till something happens, "when he says, 'I cannot allow this to go on; I must put "'down my foot and insist on performance of the contract "'with strictness.'" But even if it could here be held that what the charterers did amounted to a waiver of their right to insist upon a direct voyage, the plaintiffs are in this further difficulty. The present defendants are guarantors under an ordinary form of average guarantee, whereby in consideration of the delivery of the cargo to the consignees they guarantee the captain and owners the payment of a contribution to general average; but the consignees at the time when the general average becomes due and the guarantee operates would not necessarily be the charterers and, therefore, the guarantors are no more bound by knowledge or waiver by the charterers of their rights under the bill of lading than would be an indorsee of that bill.

For these reasons, I am of opinion that this appeal succeeds.

CLAUSON L.J. This is an appeal from a decision of Goddard J. in an action by the owners of the steamship *Indian City* against the defendants, who, by reason of an underwriters' average guarantee, are liable to the plaintiffs for any general average contribution due in

---

(1) (1924) 20 Ll. L. Rep. 40, 41.

C. A.
1938

Reardon Smith Line, Ld. v. Black Sea and Baltic General Insurance Co.

Clauson L.J.

respect of cargo shipped in that vessel by the charterers, and for a sum representing freight retained as the equivalent of jettisoned cargo. The stranding which gives rise to the claim for general average, and which was the occasion of the jettisoning, took place as the ship was entering the harbour of Constantza for the purpose of taking in oil bunkers. The question is whether in calling at Constantza on the western shore of the Black Sea the ship was on her chartered voyage. It is not suggested that the deviation clause would justify deviation to Constantza if the chartered voyage from Poti, the port of loading (on the eastern shore of the Black Sea), to Istanbul (at the outlet of the Black Sea), which was the next fixed point on the chartered voyage, lay along the direct sea route. If the calling at Constantza is to be justified as between the ship and the charterers, and, accordingly, as between the plaintiffs and the defendants, it must be justified on the ground that the chartered voyage is via Constantza. The learned judge has held that the route Poti–Constantza–Istanbul was at the material times an ordinary commercial route for an oil-burning vessel to take and that on the true construction of the charterparty, having regard to the surrounding circumstances, this route is the chartered voyage. The contention which failed before the learned judge was that the chartered voyage between Poti and Istanbul was the direct sea route. If that contention ought to succeed, the appeal must be allowed, there must be judgment for the defendants, and the retained freight must be released to the defendants.

The question accordingly is, what was the contractual voyage? The answer to that question depends upon the true construction of the charterparty. For the purpose of ascertaining the true construction of that document the Court must, as in all cases of construction of contractual documents, have regard to the surrounding circumstances in which the document was executed.

On investigating those circumstances it may be found that in fact there is some custom or usage of trade, not expressly mentioned in the contract, but which the parties may properly

C. A.
1938

REARDON SMITH LINE, LD.
v.
BLACK SEA AND BALTIC GENERAL INSURANCE Co.

Clauson L.J.

be supposed to have had in mind when they entered into the contract of affreightment. As was pointed out by Coleridge J. in *Brown* v. *Byrne* (1) it is common, in contracts as to the subject-matter of which known usages prevail, to find that the parties proceed on a tacit assumption of those usages: they commonly reduce to writing the special particulars of their agreements, but omit to specify those known usages, which are included, however, as of course by mutual understanding. Accordingly, among the surrounding circumstances to be investigated, and of which evidence is receivable, are the circumstances relating to such a custom or usage as is mentioned above.

Further, on investigating the circumstances it may be found that, while the words of the contract on the face of them seem to be clear, the application of the words to the circumstances as known to the parties at the time brings out the possibility of the words applying to two different things or subject-matters, and, if this be found to be the case, evidence is admissible to show which was the thing or subject-matter intended: *Smith* v. *Jeffryes* (2), per Alderson B.

Before turning to the terms of the charterparty and investigating the circumstances in which the present contract was executed, and considering what bearing, if any, they have on the true construction to be placed on the words which in the present contract define the contractual voyage, it may be useful to consider shortly some of the more recent reported cases in which a like problem had to be solved.

In *Leduc & Co.* v. *Ward* (3) it became necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words to be construed were: "Shipped ". . . . on steamship *Austria*, now lying in the port of Fiume, "and bound for Dunkirk . . . . to be delivered . . . . at the afore-"said port of Dunkirk." The ship proceeded from Fiume to Glasgow with a view to ultimately reaching Dunkirk. She was lost off Glasgow. The surrounding circumstances agreed or proved were (1.) that Glasgow was far off any direct route from

---

(1) (1854) 3 El. & Bl. 703, 715, 716.

(2) (1846) 15 M. & W. 561, 562.

(3) 20 Q. B. D. 475.

Fiume to Dunkirk, and (2.) that the shippers knew that the owners intended to send the ship to Dunkirk via Glasgow. It was held that the material words described a voyage, and it was also held to be the universal usage of business men to interpret the voyage, as marked out by the material words, as a voyage on the ordinary track by sea from the one place to the other, that is, the ordinary track according to a reasonable construction of the term: per Lord Esher M.R. (1) The evidence as to the shipper's knowledge of the owners' intention was rejected as inadmissible on the question of construction. It was incidentally held that a power to call at ports meant to call at ports which are substantially ports which will be passed on the named voyage.

In *Margetson* v. *Glynn* (2) it again became necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words to be construed were: "Shipped on board the steamship *Zeta* now lying in the port of "Malaga bound for Liverpool." There were very wide words giving liberty to proceed to and stay at any port or ports in any rotation over a very wide area. The Court of Appeal held that the voyage described was from Malaga to Liverpool, and that, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liverpool according to the ordinary sea course for a steamer from the former port to the latter, and she would not be entitled to stop or to call at any other port although it was on that course. She would be bound to go straight. The Court also held that the very wide words as to proceeding to and staying at various ports must be construed as subject to the limitation that they must be ports on the geographical voyage. To construe the words otherwise would (so the Court held) fail to give due meaning to the primary words describing the voyage. In the House of Lords, where the case is reported as *Glynn* v. *Margetson & Co.* (3), the House took the same view as the Court of Appeal, and it is perhaps useful to note that

(1) 20 Q. B. D. 481.

(2) [1892] 1 Q. B. 337; affirmed nom. *Glynn* v. *Margetson & Co.* [1893] A. C. 351.

(3) [1893] A. C. 351.

Lord Halsbury reaffirmed the principle stated in 1803 by Lord Ellenborough in *Robertson* v. *French* (1) that the meaning of any document is to be collected in the first place from the terms used in it, which terms are themselves to be understood in their plain ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense.

In the case of *Evans, Sons & Co.* v. *Cunard Steamship Co.* (2) in 1902 it was once more necessary to ascertain what was the contractual voyage for the purposes of a bill of lading. The material words defining the voyage were in substance, "Shipped upon the steamship *Veria* now lying in the port "of Bari bound for the port of Liverpool." The jury seem to have found that Constantinople (where the ship had called on the voyage from Bari to Liverpool) was on the customary route from Bari to Liverpool. The learned judge accepted evidence that the only practicable way to get a cargo from Bari to Liverpool was by a more or less uncertain route which passed Constantinople, and that since that was the only practicable route that must be the voyage in the business sense agreed upon. I understand him to have decided (to use the words of Lord Ellenborough cited above) that on the evidence the words to be construed had by the known usage of trade and in view of the special circumstances as to the circuitous course being the only practicable course acquired a peculiar sense—namely, "bound for Liverpool by the "circuitous route which passes Constantinople" as distinct from the prima facie sense—namely, "bound for Liverpool "by the straight sea course," which according to *Glynn* v. *Margetson & Co.* (3) the words would, apart from the remaining circumstances, have borne.

In *Frenkel* v. *MacAndrews & Co.* (4) it became necessary to decide, for the purposes of a bill of lading, what was the contractual voyage. There was no express statement of the contractual voyage in the document: see per Lord

---

(1) (1803) 4 East, 130, 135.
(2) 18 Times L. R. 374.
(3) [1893] A. C. 351.
(4) [1929] A. C. 545.

C. A.
1938

REARDON SMITH LINE, LD. v. BLACK SEA AND BALTIC GENERAL INSURANCE Co.

Clauson L.J.

Sumner (1): " Evidence " (says Lord Sumner) " was needed "to prove what that voyage was and that evidence was "tendered and was admitted without objection." The circumstances, which were undisputed, were, as stated by Lord Warrington (2), that the ship was one of a line pursuing a regular course of trading in accordance with which her usual and customary routes with goods from Malaga destined for Liverpool would be determined by ascertaining whether she was at Malaga on the outward or the homeward section of her voyage: if the former, her route from Malaga would be concisely described as " via Levante "—namely, via the east coast of Spain, if the latter, as " directo." The word " route " appeared in the deviation clause: and accordingly, while it was clear that the parties contemplated a " route " to be followed by the ship carrying the goods referred to in the bill of lading, the " route " might be the one route or the other. The word was ambiguous.

The parol evidence, which in view of the failure of the document to define the route, and the ambiguity which in the circumstances attached to the route, was thus admissible, showed clearly that the parties understood that the voyage in contemplation was " via Levante," with the result that the loss which had occurred was held in fact to have occurred on the contractual voyage.

It is noteworthy that Lord Buckmaster was careful to express the view that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route (3), and the circumstance of knowledge that it was not, or might not be, direct would not affect that construction. Lord Dunedin while accepting, as I understand it, the authority of *Leduc & Co.* v. *Ward* (4) and *Glynn* v. *Margetson & Co.* (5), and thus, as I venture to infer, in no way differing from Lord Buckmaster's view as expressed above, points out, as I read his observations (6), that it may turn out on investigation of the surrounding circumstances that there are two alternative routes, either of which would fairly come within the phrase "the ordinary track by sea" (in which case the ambiguity must, of course, be solved by extrinsic evidence) or it may turn out that "the ordinary track by sea" is not a direct geographical route, but a circuitous route adopted by custom, or general understanding, as the "ordinary route." Lord Sumner clearly and even emphatically adopts the authority of *Leduc & Co.* v. *Ward* (1) and *Glynn* v. *Margetson & Co.* (2) as unquestionable in a case where the termini of the contractual voyage are expressly stated.

---

(1) [1929] A. C. 561.
(2) Ibid. 567.
(3) Ibid. 545, 552.
(4) 20 Q. B. D. 475.
(5) [1893] A. C. 351.
(6) [1929] A. C. 545, 557.

With the light afforded by these authorities I turn to the consideration of the construction of the charterparty in the present case in view of the surrounding circumstances as they stood at the time of its execution.

The charterparty is dated September 1, 1933, and is for three steamers in three successive months. The voyage in question in this action is that of the third steamer. For the purpose of construing the charterparty the surrounding circumstances to be considered must, I venture to think, be those existing at the date of signature, September 1, 1933. Such of the evidence as deals with matters which occurred after that date cannot be relevant for the purpose of construction. I therefore propose to disregard for this purpose such facts as occurred after September 1, 1933, including, for example, evidence as to knowledge acquired by the charterers, through their agents or otherwise, after September 1, 1933.

The surrounding circumstances as at September 1, 1933, may be summarized as follows. The direct sea route from Poti (on the eastern shore of the Black Sea) to Gibraltar lies through Istanbul, and leaves Constantza (which is on the west coast of the Black Sea) a very substantial distance away to starboard. Oil fuel at the material dates was available at Constantza on more favourable terms than at Istanbul. The facts as to the sailings of oil-burning ships from Poti to the Mediterranean were matters of investigation at the trial, and owing probably to errors of transcription, were not quite accurately stated in the learned judge's judgment; but as

(1) 20 Q. B. D. 475.

(2) [1893] A. C. 351.

the result of a considerable measure of discussion between counsel in this Court, it was, I think, agreed that those facts were substantially as follows: that of the oil-burning steamers leaving Poti and other eastern Black Sea ports for the Mediterranean during the three years preceding the material date, about three-quarters went from their eastern Black Sea loading ports direct to Istanbul, and about one-quarter went off the direct route proceeding to Constantza for oil bunkering, and on thence to Istanbul. Practically all the ships belonging to the plaintiffs were among those which thus went off the direct route and proceeded via Constantza, and several of the plaintiffs' ships so proceeding were under charter to the charterers in the present case. The learned judge on these materials found that this route via Constantza was by the autumn of 1933 a well recognized and accustomed route for ships proceeding from the eastern Black Sea to Istanbul or ports beyond.

I turn now to the charterparty which has to be construed. It provides (clause 34) for three steamers in October, November and December, 1933. Each steamer after delivery of her outward cargo (which delivery was, in the case of the steamer actually in question, at Genoa) is to be in loading port and ready to load (see clause 10) within certain dates in those months. The steamers are to load at Nicolaieff or Poti, and being so loaded with all convenient speed to proceed to one of a number of named ports, all trans-Atlantic. There is machinery provided for giving orders exercising the option as between the loading ports of Nicolaieff and Poti by the time the steamer on her route from Genoa (or other her port of delivery of her previous cargo) is off Istanbul. This option was in fact duly declared for Poti. There is also machinery for declaring the option as to the trans-Atlantic destination by the time the steamer reaches Gibraltar. Owing to the stranding at Constantza the ultimate destination of the ship was in fact ultimately altered by agreement, but that, of course, has no bearing on the construction. For purposes of construction, in view of the facts as to the port of delivery of the outward cargo, and of the option as exercised, the words in the charterparty dealing with the voyage must be taken, in my judgment, to read as follows: "The ship "to proceed from Genoa with all convenient speed to Poti "and there load and being so loaded with all convenient speed "proceed to Istanbul and thence to a trans-Atlantic port to "be named." Istanbul is, of course, at the only outlet from the Black Sea.

The case for the defendants, which failed before Goddard J., was put thus: the words to be construed mean that the ship is to proceed from Poti to Istanbul on the ordinary track by sea of the voyage from Poti to Istanbul, the ordinary track according to a reasonable construction of the term. The evidence (so the defendants say) amounts to this, that while the direct sea route is the ordinary track, it is, of course, possible to take a special track from Poti to Constantza and on to Istanbul, and no doubt an owner who wishes to bunker with oil at Constantza will depart from the ordinary track and send his ship round by the special track: many owners of oil-burning ships during the period preceding the date of the charterparty in fact did so, and the plaintiffs in fact seem usually to have done so. But in the document now to be construed, "Poti to Istanbul" means the ordinary track and cannot be construed otherwise. Assuming that it be the fact that the charterers knew that the owners intended to take the special track via Constantza, the defendants say that that knowledge is, as decided by *Leduc & Co.* v. *Ward* (1), of no avail to modify the express terms of the document.

The case for the plaintiffs, as I understand it, was ultimately put thus. The words to be construed are, when the circumstances are taken into account, ambiguous. "Proceed to "Istanbul" means, no doubt, "proceed by the ordinary track "by sea"; but the circumstances show that there are two "ordinary tracks by sea," one straight to Istanbul, the other Poti–Constantza–Istanbul. The words used turn out to be ambiguous. It is, therefore, necessary to search for the meaning attached to the phrase by looking outside the words

---

(1) 20 Q. B. D. 475.

C. A.
1938

Reardon Smith Line, Ld.
v.
Black Sea and Baltic General Insurance Co.

Clauson L.J.

of the document and discovering the intention of the parties upon evidence *dehors* the contract. They go on to say that in view of the practice of the plaintiffs and of the known facts as to the convenience and economy of oil bunkering at Constantza, Goddard J. was right in concluding that the intention of the parties was that the voyage should be Poti–Constantza–Istanbul.

Now there is, as I venture to suggest, no doubt at all that you may have more than one " ordinary track by sea " from point A. to point B. Lord Dunedin in *Frenkel* v. *MacAndrews & Co.* (1) gives the case where there may be a choice between the Suez Canal, the Panama Canal, or round Cape Horn. *Frenkel's* case (2) was a case where there were two "ordinary tracks "by sea"—namely, " via Levante " and " directo." The plaintiffs' contention is that the present case is one in which there are two " ordinary tracks by sea," one the direct line Poti–Istanbul, and the other the more circuitous track Poti–Constantza–Istanbul. The plaintiffs say, and say truly, some owners prefer the one route ; some the other : you get the benefit of a shorter line by one, but you get the advantage of greater bunkering convenience by the other ; but there are in the present case, they say, two " ordinary tracks by sea," and not one only.

In my view, the defendants' submission is the correct one. It does not appear to me to be true to say that there is in the present case any ambiguity, or that there are two "ordinary tracks by sea." There is one track Poti–Istanbul, from which some traders diverge for special reasons so as to reach Istanbul by a special and circuitous route via Constantza. The termini of the voyage are fixed : it is not a case of the existence of such purely navigational alternatives as are envisaged by Lord Dunedin in the passages to which I have referred in his opinion delivered in *Frenkel* v. *MacAndrews & Co.* (1) ; it is not a case of two alternating routes such as the homeward and outward routes, each passing Malaga, which existed in the same case. The two routes Poti–Istanbul and Poti–Constantza–Istanbul seem to me not to be alternating

(1) [1929] A. C. 545, 557.

(2) Ibid. 545.

routes. In view of the cases of *Leduc & Co.* v. *Ward* (1) and *Glynn* v. *Margetson & Co.* (2), and the views in regard to a route between fixed termini indicated by Lord Buckmaster and (as I venture to add) by Lord Dunedin and Lord Sumner in *Frenkel* v. *MacAndrews & Co.* (3) the Constantza route cannot, in my view, be treated as a mere alternative route: it is a deviation for special purposes from the ordinary route by sea, and none the less a deviation by reason of its being, at the material time, for reasons connected with the price of oil at Constantza, a not uncommon deviation.

For these reasons I feel compelled to differ from the decision of Goddard J.; and for my own part I should allow the appeal, enter judgment for the defendants, and order the deposited freight to be paid over to the defendants.

Appeal allowed.
Leave to appeal to the House of Lords granted.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Botterell & Roche.*

(1) 20 Q. B. D. 475.
(2) [1893] A. C. 351.
(3) [1929] A. C. 545.

J. R.

C. A.

1938

June 24, 27; *July* 11.

WARDELL *v.* KENT COUNTY COUNCIL.

Workmen's Compensation—Injury by accident arising out of and in the course of employment—" Workman "—Nurse employed in hospital —Preparation of antiphlogistine poultice for patient—Directions given by sister in charge of ward—Explosion of preparation— Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 3.

The applicant, who was a fully qualified hospital nurse, was employed as a temporary nurse in a hospital owned and controlled by the respondents. The applicant had been instructed by the sister in charge of the ward in which she was working to prepare and apply to a patient an antiphlogistine poultice. While the applicant was heating the preparation it exploded and caused injuries to the applicant in respect of which she claimed compensation. It appeared from the evidence that the applicant was subject to the rules and regulations of the hospital as to the times of sleeping, meals and recreation, and was generally under the control of the matron. When in the ward the applicant was subject to the control of the sister in charge of the ward, and she was carrying out the instructions of the sister when the accident happened. The matron said that the sister would give the nurse instructions as to what was to be done during her absence. In case of disagreement as to the method of carrying out the sister's orders the nurse would be obliged to obey the sister's instructions. In a claim for compensation under the Workmen's Compensation Act the county court judge sitting as arbitrator made an award in favour of the respondents on the ground that the applicant was not a " workman " within the meaning of the Workmen's Compensation Act, the contract between her and the respondents being one for services and not of service. Upon appeal to the Court of Appeal :—

Held, by Slesser and MacKinnon L.JJ. (Greer L.J. dissenting), that the applicant was a " workman " within the Workmen's Compensation Act, 1925, as she was working under a contract of service with the respondents, and therefore was entitled to compensation in respect of her injuries, which were caused by an accident arising out of and in the course of her employment.

APPEAL from a decision of His Honour Judge Clements sitting at the Maidstone County Court upon an application for compensation under the Workmen's Compensation Act.

The applicant, Annie Wardell, who was a fully qualified hospital nurse, was employed by the Kent County Council as a temporary nurse at the County Hospital, Farnborough, which was owned and controlled by the Kent County Council. Whilst in the performance of her duties in that capacity she met with a serious accident. She had been instructed by a sister in the ward to apply a poultice of antiphlogistine to a patient. While she was preparing the poultice by heating the antiphlogistine in a tin, there was an explosion, with the result that she was seriously injured.

The applicant gave evidence that she was a member of Melton Nurses Co-operation, and that her salary of 3*l.* per week was sent to the Co-operation, National Health Insurance being deducted before the salary was sent. She worked in the ward under the direction of a sister in the employment of the Kent County Council. It was her duty to obey the instructions of the sister. The accident happened while she was carrying out the instructions of the sister. In cross-examination she said that she would be told what to do but not how to do it. She would be told what quantity in case of injection and that would be checked.

The matron of the Farnborough Hospital in giving evidence said that there were 160 nurses in the hospital. The applicant would be under the sister in charge of the ward while the sister was in the ward. Before going off duty the ward sister would give the applicant instructions as to what was to be done in her absence. In cross-examination she said that the applicant would be instructed what to do but not how to do it. In case of disagreement as to the method of carrying out the sister's orders the nurse would be obliged to obey the sister's instructions.

Counsel for the respondents, the Kent County Council, called no evidence, but submitted that the applicant was not a workman within the meaning of the Workmen's Compensation Act, 1925, and that she had never entered into or worked under any contract of service with the respondents.

The county court judge in the course of his judgment said: This case turns upon whether there was a contract of service or a contract for services, and it is necessary to consider the powers of dismissal, the character and terms of the engagement, and the payment of wages. The exact terms of the engagement are not set out, but through a society the applicant was put in touch with the Kent County Council,

C. A.
1938

WARDELL
v.
KENT
COUNTY
COUNCIL.

by whom she was employed on this and on a former occasion. There is nothing in writing between the parties, but there is an insurance card, presumably filled in by the Kent County Council.

The difference between a contract of service and a contract for services has been illustrated by Cozens-Hardy M.R. in *Simmons* v. *Heath Laundry Co.* (1), where he said: "An "usher in a private school or a teacher in a provided or "non-provided school, or a nursery governess would, under "ordinary circumstances, be entitled to claim the benefit of "the Act. On the other hand it would, I think be absurd "to hold that a skilled music master who gives lessons to "a pupil, either in his own house or in the pupil's house, is "to be regarded as the 'workman' and the pupil as the "'employer.' In such a case there may be a contract for "services, but there is not a contract of service. In any "particular case it will be for the arbitrator, after considering "all the circumstances, to decide whether the injured professional person is or is not a 'workman.' This is not a "question of law, but a question of fact, and, unless the "arbitrator has misdirected himself, this Court ought not to "interfere."

The applicant is a fully qualified hospital nurse and as such she takes up her employment at the hospital. What is her position directly she enters its doors? She is subject to the rules and regulations of the hospital as to times of sleeping, meals, and recreation. She is under the control of the matron, and when in a ward she is only subject to the control of the sister of the ward.

In this case she was carrying out the instructions of the sister when the accident happened.

In the case of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2) Farwell L.J. remarks that the nurses and carriers assisting at an operation cease for the time being to be the servants of the hospital and the contract of the hospital is not to nurse during the operation, but to supply nurses and others in whose selection they have taken due care. In the case of *Strangways-Lesmere* v. *Clayton* (1) it is pointed out that the managers provide a hospital, but doctors and nurses are skilled people whose action cannot be controlled by the committee.

---

(1) [1910] 1 K. B. 543, 548.

(2) [1909] 2 K. B. 820.

The Kent County Council provide a hospital at Farnborough for medical and surgical assistance to those who come there, and they pay their nurses. Are those nurses servants of the Kent County Council within the meaning of the Workmen's Compensation Act? Would those nurses tolerate such a position, which would mean that the professional duties they perform as nurses would be under the control of the members of the Kent County Council, any more than doctors or dentists would tolerate such a position? Such a position would be intolerable to the patients and the nurses. The contract under which the nurse is working does not include, in my opinion, such a right of control by the Kent County Council.

The nurse puts her services at the disposal of the Hospital Committee, for payment it is true; but she does not agree that the Hospital Committee at any time can interfere with her as to the manner in which she does her work.

That being so, it seems to me in this case there was no contract of service between the applicant and the respondents. The contract was one for services and not of service. The award must be for the respondents.

The applicant appealed.

G. J. Paull and *S. Seuffert* for the appellant. The decision of the county court judge was wrong. There is no question but that the nurse was under a contract with the Kent County Council, the only question is as to the terms of that contract. The fact that she has to obey the orders of the doctor does not prevent her from being under a contract of service with the Kent County Council. The terms on which she was employed were (1.) To receive a weekly wage of 3*l*. (2.) To work at a hospital controlled by the Kent County Council. (3.) To obey the regulations of the hospital as to the times of sleeping, meals and recreation.

(1) [1936] 2 K. B. 11.

(4.) To obey the person whom the Kent County Council had placed in control of the hospital. (5.) To obey the person whom the matron had placed over her in the ward. (6.) To submit to the deductions from her wages in respect of National Health Insurance. (7.) Disobedience to any of the orders given to her might result in her dismissal. These clearly show that the applicant was under a contract of service with the Kent County Council, and was therefore a "workman" within the Workmen's Compensation Act, 1925. The definition of the expression "workman" in s. 3, sub-s. 1, of that Act is "any person who has entered into or works under a contract "of service or apprenticeship with an employer, whether by "way of manual labour, clerical work or otherwise, and "whether the contract is expressed or implied, is oral or in "writing." The county court judge applied the wrong test —namely, whether she was under the control of the members of the Kent County Council with regard to her work. The fact that the person employed has to use skill does not prevent that person from being a "workman" within the Act. It was held in *Walker* v. *Crystal Palace Football Club* (1) that a professional football player was a "workman" within the Act. In *Simmons* v. *Heath Laundry Co.* (2) Cozens-Hardy M.R. drew a distinction between an usher in a private school or a teacher in a provided or non-provided school, who would under ordinary circumstances be entitled to the benefits of the Act, and a skilled music teacher who gave lessons to a pupil. In the latter case there might be a contract for services but not a contract of service. The only case dealing with the position of a nurse under the Workmen's Compensation Acts was *Dow* v. *M'Neill.* (3) In that case the proprietrix of an estate engaged a trained sick nurse to attend, under the directions of a doctor, the child of a cottager on the estate in whom she was interested. She paid the doctor's fees and the nurse's charges, but did not in any way interfere with the nurse in the discharge of her duties. The case was a difficult one calling for skilled nursing. It was held that the nurse

(1) [1910] 1 K. B. 87.

(2) [1910] 1 K. B. 543, 548.

(3) 1925 S. C. 50.

was employed under a contract for professional services and not under a contract of service, and accordingly was not a "workman" within the meaning of the Workmen's Compensation Acts. The Lord President pointed out in that case that "the nature of the case which the nurse is called on to "attend, or the circumstances of the household or institution "in which she discharges her functions, might determine "the character of her employment as being truly, or sub-"stantially, one of service on the one hand or for services on "the other." In that case the nurse was employed as a person whose training and qualifications fitted her to take the responsible charge of an anxious case under the directions of skilled advice. The facts of that case were very different from the facts of the present case. *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) is distinguishable from the present case because there the action was for damages for injuries alleged to have been caused to a patient during an operation by the negligence of some member of the hospital staff, and it was held that nurses assisting at an operation cease for the time being to be servants of the hospital authorities, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities. In *Marshall* v. *Lindsey County Council* (2) it was held by the majority of the Court of Appeal that the defendants were liable for the failure of their servant, the matron of a maternity home, in the course of her administration of the home, to inform the plaintiff of a case of puerperal fever when she knew or ought to have known that by reason of the absence of warning there was grave risk of danger to the plaintiff. That decision was affirmed by the House of Lords. (3) [*Armour* v. *British International Pictures* (4) was also cited.]

Sir Walter Monckton K.C. and *B. H. Waddy* for the respondents, the Kent County Council. The county court judge was right in holding that the applicant had failed to prove that there was a contract of service between her and

(1) [1909] 2 K. B. 820.
(2) [1935] 1 K. B. 516.
(3) [1937] A. C. 97.
(4) (1930) 23 B. W. C. C. 367.

C. A.
1938

WARDELL v. KENT COUNTY COUNCIL.

the Kent County Council. That question is one of fact and degree, and, as the judge has applied the right principle of law, his decision ought not to be upset. The fact that the nurse decided the way in which the work she did had to be done is conclusive of the question. It is true that she had to take the instructions of the sister in charge of the ward, but in giving those instructions the sister was acting as a skilled person and not as the servant of the Council. The nature of the treatment would be determined by the doctor, but in so doing he would not be acting as a servant of the Council, and the nurse qua treatment would be acting under the direction of the doctor and not under the direction of the respondent Council. The preparation of the antiphlogistine and the application of it to the patient was the work of a skilled person, and the nurse in doing that work was not doing administrative work. It was held in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) that the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff, and that if they duly perform that duty they are not liable for the negligence of one of the medical staff in the course of performing an operation. Both Farwell L.J. and Kennedy L.J. put nurses assisting at an operation in the same category as the medical staff. Kennedy L.J. expressed the opinion that the hospital authorities might be liable for the due performance by their servants of their purely ministerial or administrative duties. The line of demarcation is where medical treatment begins and routine duties end. Fletcher Moulton L.J. said in *Simmons* v. *Heath Laundry Co.* (2) that it was impossible to lay down any rule of law distinguishing a contract for services from a contract of service. It was a question of fact to be decided by all the circumstances of the case, and that the decision of the county court judge upon that question of fact could not be interfered with. It was held in *Walker* v. *Crystal Palace Football Club* (3) that a professional football player was a " workman "

(1) [1909] 2 K. B. 820.
(2) [1910] 1 K. B. 543, 549.
(3) [1910] 1 K. B. 87.

within the meaning of the Workmen's Compensation Acts because he was bound to obey the directions which the captain, as the delegate of the club, gave to him during the course of the game. That case was commented upon and explained by the Lord President in *Scottish Insurance Commissioners* v. *Edinburgh Royal Infirmary.* (1) Horridge J. held in *Strangways-Lesmere* v. *Clayton* (2) that the hospital authority were not liable for the negligence of two nurses in administering an overdose of a dangerous drug just before an operation, the only duty resting on the hospital being to see that the nurses who were engaged were duly qualified. Lord Hailsham L.C. in *Lindsey County Council* v. *Marshall* (3) accepted the proposition laid down by Kennedy L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (4) that the responsibility of the hospital authorities is limited to undertaking that the patient "shall be treated only by experts, whether surgeons, physicians "or nurses, of whose professional competence the governors "have taken reasonable care to assure themselves." The principle is there not limited to operations, and applies to nurses as well as to doctors. Lord Sankey (5) also accepted the proposition that "the local authority is not responsible "for negligence of doctors, matron or nurses while acting "in the course of their professional functions and knowledge." The nurse while preparing the antiphlogistine was acting in a professional capacity and not as the servant of the Council.

G. J. Paull in reply. The argument advanced on behalf of the respondents is founded upon a fallacious proposition —namely, that the question whether or not the applicant was a " workman " within s. 3 of the Workmen's Compensation Act, 1925, depends upon the work she was doing at the time of the accident. That proposition is fallacious. The applicant is either a workman within the meaning of the Act or she is not a workman irrespective of the work she was doing at the time of the accident. In order to decide whether she is

(1) 1913 S. C. 751, 757.
(2) [1936] 2 K. B. 11.
(3) [1937] A. C. 97, 108.
(4) [1909] 2 K. B. 820, 829.
(5) [1937] A. C. 113.

a workman within the meaning of the Act one has to look at the contract under which she performs her duties. A nurse employed in a hospital comes within the Workmen's Compensation Act even when she is doing work in the operating theatre under the direction of the doctor. Sect. 3 of the Act defines the expression "workman" as meaning "any "person who has entered into or works under a contract "of service . . . . with an employer." Under s. 1 of the Act the accident in order to give rise to a claim for compensation for personal injuries has to arise "out of and in "the course of the employment." Unless there are two contracts one has to look at the contract under which the applicant works and see whether it is a contract of service or a contract for services. The mere fact that she has to work under the direction of a doctor, or that she has to do skilled work, does not take her out of the Act. The work that the applicant was doing at the time of the accident is not the true test. The test that was laid down in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) does not apply to cases under the Workmen's Compensation Acts. No one would contend that the applicant had entered into two contracts with the hospital authorities. The question is whether she had entered into a contract of service with the hospital authorities, and, if she had, it is immaterial what work she was doing at the time of the accident or under whose orders she was working. The fact that an employer told his servant to obey the orders of X would not prevent the servant from being in the service of his employer. All that has happened in the present case is that the applicant may have been lent by the hospital authorities to the doctor or ward sister. Nevertheless the nurse continues in the service of the hospital authorities. A nurse always works under the direction of some one whereas a doctor is not under the direction of any one. When the applicant was obeying the directions of the ward sister or of the doctor she was still in the service of her employers, because she was doing what her employers had told her to do—namely, to obey the

(1) [1909] 2 K. B. 820.

orders of some one who had been nominated by the hospital authorities to give orders to her. If the nurse disobeyed the orders of the doctor, the doctor could not discharge her, only the hospital authorities could dismiss her. *Scottish Insurance Commissioners* v. *Edinburgh Royal Infirmary* (1) dealt with the position of the doctors in the Infirmary under the National Health Insurance Act. It was never suggested that a nurse could ever work otherwise than under a contract of service. The reasoning of the Lord President when he sought to draw a distinction between a hospital and a football club was not correct. The decision in *Walker* v. *Crystal Palace Football Club* (2) is correct and ought to be applied in the present case. If the argument advanced for the respondents is correct it would be impossible to assess the compensation to which a nurse was entitled for an injury sustained in her administrative work. The applicant under her contract must work at a particular place and at particular times and must obey the orders of other persons. She was therefore working under a contract of service. She was not an independent contractor with a contract for services. It was not proved that at the time of the accident the applicant was working outside her contract of service.

Cur. adv. vult.

1938. July 11. The following judgments were read:—

GREER L.J. This is an appeal by the applicant, Nurse Annie Wardell, from the decision of a county court judge sitting as arbitrator under the Workmen's Compensation Act, in which he made an award in favour of the County Council, the respondents, with costs, on the ground that the contract between the applicant and the County Council was one for services and not of service.

The relevant facts of the case are few and not in dispute. The applicant was a trained nurse acting under the direction of another trained nurse who had acquired the superior nursing title of "sister" and was the sister in charge of the ward in which the applicant was working at the time

(1) 1913 S. C. 751.
(2) [1910] 1 K. B. 87.

she met with her injuries. According to her evidence, she would be told by the sister what to do but not how to do it. According to the matron, the applicant would be under the instructions of the sister while the sister was in the ward, and before going off duty the ward sister would give the applicant instructions as to what was to be done during her absence; that is, as appears in her cross-examination, she would be instructed what to do but not how to do it. When she met with the accident which was alleged to entitle her to compensation the applicant was preparing a poultice of antiphlogistine to be applied, when prepared, to a patient in the ward. While she was still preparing the poultice, it exploded in the can in which it was being heated and caused the injuries in respect of which she claimed compensation.

The question involved in the appeal is whether at the time the applicant met with her injuries she was acting under a contract of service which she had entered into with the County Council as her employer to serve such employer, or whether she was in fact engaged in duties which were not duties of service to her employer but duties she was performing not as a servant or agent but, like a surgeon, as somebody nominated or appointed as a skilled nurse to do professional nursing work. I think the authorities with regard to liability for injury occasioned by the negligence of surgeons, physicians and nurses to patients are authorities which can rightly be used for the purpose of determining whether an act which causes damage to such persons can be regarded as an act done under a contract of service. I may take, for example, the instance of a house surgeon who is very frequently paid only a small salary, and sometimes no salary at all. Could it be said that in taking part in the performance of a surgical operation such house surgeon could be held to be acting pursuant to a contract of service with the proprietors of the hospital? It seems to me that the decision in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) involves a decision

(1) [1909] 2 K. B. 820.

that in performing his surgical duties a house surgeon is not doing anything as a servant of the proprietors or governors of the hospital. In providing surgeons or nurses the proprietors of the hospital are not providing such surgeons or nurses to perform acts of service on behalf of such proprietors: they are merely appointing them as persons who are fit to exercise, in accordance with their own judgment, their professional skill. In deciding in what capacity surgeons or nurses are when they exercise their skill in hospitals, Farwell L.J. used the following words (1): "The three "nurses and the two carriers stand on a somewhat different "footing, and I will assume that they are the servants of "the defendants. But although they are such servants for "general purposes, they are not so for the purposes of operations "and examinations by the medical officers. If and so long "as they are bound to obey the orders of the defendants, "it may well be that they are their servants, but as soon "as the door of the theatre or operating room has closed "on them for the purposes of an operation (in which term "I include examination by the surgeon) they cease to be "under the orders of the defendants, and are at the disposal "and under the sole orders of the operating surgeon until "the whole operation has been completely finished; the "surgeon is for the time being supreme, and the defendants "cannot interfere with or gainsay his orders. This is well "understood, and is indeed essential to the success of "operations; no surgeon would undertake the responsibility "of operations if his orders and directions were subject "to the control of or interference by the governing body. "The nurses and carriers, therefore, assisting at an "operation cease for the time being to be the servants of the "defendants, inasmuch as they take their orders during that "period from the operating surgeon alone, and not from the "hospital authorities." And the same learned Lord Justice said (2): "The nurses and attendants are not put in the place "of the hospital to do work which the governors of the "hospital intended to do themselves." In the case of *Lindsey*

---

(1) [1909] 2 K. B. 826.

(2) Ibid. 827.

C. A.
1938
WARDELL
v.
KENT
COUNTY
COUNCIL.
Greer L.J.

County Council v. *Marshall* (1) both Viscount Hailsham L.C. and Viscount Sankey expressed agreement with what Farwell L.J. said in *Hillyer* v. *Governors of St. Bartholomew's Hospital.* (2) Lord Sankey uses these words (3) : " The learned counsel "for the appellants in my view correctly summed up the law "as laid down in those cases " (that is to say, *Evans* v. *Mayor of Liverpool* (4) ; *Hillyer* v. *Governors of St. Bartholomew's Hospital* (5) ; and *Hall* v. *Lees* (6)) "in the following way : 'In "'the case of a nursing home conducted by local authorities, "'the local authority is not responsible for negligence of "'doctors, matron or nurses while acting in the exercise of "'their professional functions and knowledge.' " It seems to me that the meaning of the decisions in the cases referred to is that in so acting doctors, matrons and nurses are not acting as servants of the proprietors of the hospital. If they were, the hospital would be liable for their acts. It is true that a nurse may be engaged in a dual capacity, that is to say, she may be appointed to do work which is outside any contract of service, and she may also be appointed to do what is compendiously called administrative work, that is to say, the work she does as a servant of the proprietors of the hospital. If she causes injury while in the latter capacity, or suffers injury herself arising out of and in the course of her employment in such capacity, the proprietors of the hospital in the one case would be liable in an action for damages by the person injured, and in the other case liable to pay compensation to the nurse if the nurse suffered injury. When she is doing her work as a nurse the proprietors of a hospital are, in my judgment, neither liable to persons injured by her negligent acts, nor liable to her under the Workmen's Compensation Acts for injuries received while acting as a nurse. As soon as a nurse or sister goes to her ward and starts her nursing duties she passes from the territory in which she is serving her employer under a contract of service to the territory in which she has engaged

(1) [1937] A. C. 97.
(2) [1909] 2 K. B. 826.
(3) [1937] A. C. 113.
(4) [1906] 1 K. B. 160.
(5) [1909] 2 K. B. 820.
(6) [1904] 2 K. B. 602.

to give her services as a skilled nurse for the benefit of the hospital patients.

For these reasons I think the learned judge was entitled to find as he did, and the appeal should be dismissed with costs.

SLESSER L.J. The only question which calls for consideration in this Court is whether the applicant, Annie Wardell, a hospital nurse who has sustained injury by accident, while working in the County Hospital of the Kent County Council, is a workman within the meaning of the Workmen's Compensation Act, 1925. The definition of a workman, so far as is here material, is " any person who has entered into "or works under a contract of service." The problem arises, Was this lady when she met with her accident so working?

In so far as the matter is one of fact, the evidence is uncontradicted that at the time of the accident she was working in a ward in the defendants' hospital and had been instructed by the sister to prepare and apply to a patient a preparation known as antiphlogistine. While she was heating the preparation it exploded and she was seriously injured.

The applicant is found by the learned county court judge to be a fully qualified hospital nurse and as such took up her employment at the hospital. She was subject to the rules and regulations of the hospital as to the times of sleeping, meals and recreation and was generally under the control of the matron. When in a ward she was normally subject only to the control of the sister, and she was carrying out instructions of the sister when the accident happened. It would appear from the evidence of the matron that the sister would give the nurse instructions what was to be done during her absence. In case of disagreement as to the method of carrying out the sister's orders the nurse would be obliged to obey the sister's instructions. In these circumstances, it is clear to my mind that at all times the nurse was required by her contract to obey directions as to the manner in which she should do her work, though the particular person who would prescribe that manner might well vary according to

C. A.
1938

WARDELL
v.
KENT
COUNTY
COUNCIL.

Slesser L.J.

the particular work on which the nurse was engaged. In *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) it was pointed out generally that nurses and other attendants, otherwise under the direction of these employers, while assisting at an operation may be required to take their orders during that period from the operating surgeon alone and not from the hospital authorities. As a consequence, in an action against the hospital authorities for negligence of the members of the hospital staff alleged to have taken place during an operation, it was held that the action was not maintainable. Farwell L.J. (2) points out that the nurses, he will assume, are servants of the hospital authority: "But although they "are such servants for general purposes, they are not so "for the purposes of operations and examinations by the "medical officers. If and so long as they are bound to obey "the orders of the defendants, it may well be that they are "their servants, but as soon as the door of the theatre or "operating room has closed on them for the purposes of an "operation . . . . they cease to be under the orders of the "defendants, and are at the disposal and under the sole orders "of the operating surgeon. . . . . The nurses and carriers, "therefore, assisting at an operation cease for the time "being to be the servants of the defendants, inasmuch as "they take their orders during that period from the operating "surgeon alone, and not from the hospital authorities." Kennedy L.J. says (3): "It may well be . . . . that the "hospital authority is legally responsible to the patients for "the due performance of their servants within the hospital "of their purely ministerial or administrative duties, such "as, for example, attendance of nurses in the wards, the "summoning of medical aid in cases of emergency, the supply "of proper food, and the like." These observations were, of course, made in regard to the circumstances of the particular case; but they afford a useful guidance as to the general position with regard to obligations of obedience of persons such as the applicant.

---

(1) [1909] 2 K. B. 820.
(2) Ibid. 826.
(3) Ibid. 829.

The learned county court judge, however, in this case does not appear to have considered that nurses were the servants of the Kent County Council even when they were performing only administrative duties. "Speaking generally," he says, "the contract under which the nurse is working "does not include a right of control by the Kent County "Council." Again, limiting the matter for the moment to administrative or non-curative services, this appears to me to be contrary to the evidence and admitted facts. The County Council, as such, appoints the matron and the sister, both of whom may be free in the manner in which they do their work and consequently not be under contracts of service. That is not, however, the material question, but whether the nurse is under a contract of service. In the case of a limited company, which must of necessity act through agents, the control of the company's servants may be exercised through a manager or agent himself free of any contract of service, yet it may be an express or implied term of the contract of any particular servants of the company that they shall comply with the instructions of such manager or agent and so be under a contract of service with the company. So here, in their administrative duties at least, the evidence goes to show that the nurses are under the complete direction of the matron or sister, as the case may be. Had this nurse injured herself while performing an administrative duty on the instructions of a sister, I entertain no doubt that she would have been acting under a contract of service and so be a workman. Had she, for example, as a matter of hospital routine, been engaged in the placing of a hot-water bottle into a patient's bed upon a cold night—an operation quite distinct from any curative act—and had the bottle burst and had she therefor claimed compensation, she would have been a workman, although, as I read the learned county court judge's judgment, he would have been of the contrary opinion. Does it make any difference that the hot-water bottle was, on the directions of the sister or the doctor, to have been placed upon the body of a patient for curative purposes, so that at one moment the lady is to be deemed

C. A.
1938

WARDELL
v.
KENT
COUNTY
COUNCIL.

Slesser L.J.

a workman and at another, being under the orders of doctor or sister in a curative capacity, when acting under a doctor or sister who does not take instructions as to the manner of working from the hospital, the nurse is not under such a contract? This is, I think, the result of the conclusion for which Sir Walter Monckton contends.

In my view, Mr. Paull is right when he says that the cases of negligence, respondeat superior, are of no assistance to a solution of this problem. He contends that on the facts of this case the nurse has entered into one contract and not into several; that whether she is performing curative services or not she has agreed to take the orders of the respondents as to the manner of the performance of her work exercised either through the doctor, the matron or sister, as the case may be.

The highest way in which the respondents can put their case is that, during the sovereignty of the doctor, the respondent authority have loaned to him the services of the nurse. I do not think the Act makes any such nice distinctions. Sect. 5 of the Act, in defining the meaning of "employer," provides that "where the services of a "workman are temporarily lent . . . . to another person by "the person with whom the workman has entered into a "contract of service . . . . , the latter shall . . . . be deemed "to continue to be the employer of the workman whilst he "is working for that other person." Again, under s. 9 the compensation is to be a weekly payment calculated on the basis of the workman's average weekly earnings; and by sub-s. 2 (i.) "the weekly payment shall, subject to "rule (ii.), be a sum not exceeding 50 per cent. of the work-"man's average weekly earnings during the previous twelve "months, if he has been so long employed by the same "employer." For the purpose of such calculations, s. 10, sub-s. 3, says that "Employment by the same employer shall be "taken to mean employment by the same employer in the grade "in which the workman was employed at the time of the "accident, uninterrupted by absence from work due to illness "or any other unavoidable cause." I cite these provisions, which on the respondents' view would require the omission of all consideration of payment during the curative duties —and there are many others which raise the same point— as illustrations of the impracticability of dividing the contract of service which has been entered into, and of which the Act speaks, by intervals, omitting those times when the person giving the direction is not for the moment acting under the general authority of the employer but under the authority of his nominee. I think that the more reasonable way of looking at the matter, which is one more consistent with the whole structure of the Workmen's Compensation Act, 1925, as applied to this case, is that this nurse, on the evidence, was always under obedience to the respondents, though the hospital authority might choose from time to time the person whose orders she would be called upon to obey.

It may well be that for the purposes of making an employer responsible at common law for the negligent acts of a servant, the employer can escape by showing that the alleged servant was, at the time of the wrong complained of, acting outside the sphere of his employment or working for another. This fact may co-exist with the continuance of a contract of service: *Hillyer's* case (1), *Strangways-Lesmere* v. *Clayton* (2), and *Marshall* v. *Lindsey County Council* (3) do not establish more than this; that it may well be that the governors of a hospital do not themselves undertake to operate or assist in operating but only to supply qualified persons to act as nurses under the control of the operating surgeon: per Collins M.R. in *Hall* v. *Lees*. (4) This alone does not necessarily enable them to contend that they have not employed the nurse on the footing that she must comply with the directions of such persons as they may prescribe.

I think that throughout the execution of all her duties she was working under a contract of service, and am, therefore, of opinion that the learned county court judge was wrong in holding that this nurse was not a workman within the meaning of the Act, and that this appeal succeeds.

(1) [1909] 2 K. B. 820.
(2) [1936] 2 K. B. 11.
(3) [1935] 1 K. B. 516.
(4) [1904] 2 K. B. 602, 615.

C. A.
1938

WARDELL
v.
KENT
COUNTY
COUNCIL.

MACKINNON L.J. In this case the applicant, Miss Wardell, was employed as a nurse in a hospital maintained by the Kent County Council at Farnborough. She was paid a salary of 3*l.* a week. She was a qualified nurse. As to the nature of her duties there was very little evidence. It was, no doubt, assumed that her primary task was to perform the duties notoriously falling upon a qualified nurse in attendance on patients in a hospital. She herself said that she worked in a ward under the directions of a sister who was in charge of the ward. "It was my duty to obey the instructions of "the sister. I was fully trained. I would be told what to "do but not how to do it. I would be told what quantity in "case of an injection and that would be checked." The matron's evidence was that the nursing staff under her control numbered 160. "Miss Wardell was in a children's ward. "That was in charge of the sister, Miss Morris. The applicant "would be under the sister's instructions while she was "present in the ward. Before going off duty the sister would "give her instructions what to do in her absence. She would "instruct her what to do but not how to do it. If there "was any disagreement between her and the sister as to the "method of carrying out the sister's orders she would be "obliged to obey the sister's instructions." That was the whole of the evidence with regard to her position and her duties.

On June 15, 1937, the sister told Miss Wardell to apply an antiphlogistine poultice to a patient. It was necessary for her to prepare this substance by heating it in a tin. While she was doing this there was some sort of explosion, the stuff flew into her eyes, and the applicant was injured.

In respect of this accident she claimed compensation. The only defence filed by the respondents was "that the applicant "is not a workman to whom the Act applies." This defence has been accepted and upheld by the arbitrator.

The material part of the definition of "workman" in s. 3 of the Act of 1925 is as follows: "In this Act . . . . the "expression 'workman' . . . . means any person who has "entered into or works under a contract of service . . . . with "an employer, whether by way of manual labour, clerical "work or otherwise."

Apart from authority I should have thought it clear that the applicant was working under a contract of service with the respondents as her employers within the terms of that definition. It is true that she possessed the skill of a trained and qualified nurse, and no doubt impliedly agreed to exercise that skill in return for her weekly wage. But many a person, who is clearly a workman within the definition, possesses and is engaged to exercise some qualification of skill, e.g., a chef, or a cabinet-maker, or a compositor, or even a professional football player, as was held in *Walker* v. *Crystal Palace Football Club*. (1)

Cozens-Hardy M.R., in a classic judgment in *Simmons* v. *Heath Laundry Co.* (2), pointed out that it must be a contract of service, and not a contract for services. He illustrated the contrast by pointing out that an usher in a private school, or a teacher in an elementary school, or a nursery governess would ordinarily be within the Act. On the other hand it would be absurd to hold that a skilled music master giving a music lesson is to be regarded as a workman and the pupil as the employer.

In the present case, applying that test, the arbitrator has held that the applicant (and I suppose all the 160 nurses in the hospital) was working under a contract for services to be rendered by her, but not under a contract of service. And he likens her status, as a nurse, to that of the doctors or dentists attending the patients in the hospital.

I cannot agree with this conclusion. A teacher in a school has, or ought to have, at least as high a degree of skill of his own sort as a trained hospital nurse of hers. That he should be a workman, under a contract of service, and she in the more glorified position of a professor condescending to render services, and thereby beyond the protection of the Act, seems to be a totally wrong application of the principle indicated by Cozens-Hardy M.R.

So much for the Act, and the authorities that have explained

(1) [1910] 1 K. B. 87.

(2) [1910] 1 K. B. 543, 548.

it. But in regard to the position of those who work in hospitals there is another line of authorities on which reliance is placed for the respondents, and I think it is the existence of those cases which has led the learned arbitrator astray in the present case. They have nothing directly to do with the Workmen's Compensation Act, and in my opinion equally they have no indirect bearing on the question whether a nurse is a workman within the Workmen's Compensation Act.

The type of case to which I refer deals with the responsibility towards patients in a hospital of the managers or proprietors of a hospital for the negligent acts or omissions of the doctors, surgeons, or nurses whom they employ in the hospital to tend the sick. *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) is one of them. The governors of the hospital, it was held, were not liable for any negligence by nurses during an operation. Farwell L.J. said: "The three nurses . . . . "I will assume . . . . are the servants of the defendants. "But although they are such servants for general purposes" —and if he had thought of it I believe he would have said "under the Workmen's Compensation Act"—" they are not "so for the purposes of operations and examinations by the "medical officers."

But the true ratio decidendi of such cases is in ascertaining what is the contract between the governors or proprietors of the hospital and the patients. If the contract were: "We will treat you in our hospital by the doctors and nurses "we employ," then they might be liable for negligence by such servants. But the contract in truth is: "We will "provide a hospital, and we will there provide duly qualified "doctors and nurses"; then, if they have done all they promised to do, and have provided duly qualified nurses, they are not liable for their negligence. This is clearly stated by Farwell L.J. lower on the page from which I quoted (2): "The contract of the hospital is not to nurse during the "operation, but to supply nurses and others, in whose selection "they have taken due care."

(1) [1909] 2 K. B. 820. (2) Ibid. 826.

The truth is that, as between the hospital and the nurses, the nurses are so manifestly in the service of the hospital, that it becomes, for that very reason, necessary to enquire whether, as between the hospital and the patients, the hospital is liable for the negligence of those who are in their service.

In my view, the question whether the present respondents would have been liable to a claim for negligence of Miss Wardell, if the tin which burst had injured a patient, has absolutely nothing to do with the question whether she can claim as a workman under the Workmen's Compensation Act. If such a claim were made, its fate would depend on the nature of the contract between the patient and the respondents. If it were of the same nature as that found in *Hillyer's* case (1), namely, that the respondents would provide for the patient duly qualified nurses and no more, the patient's claim would fail, for they would have fulfilled their contract.

But as between the applicant and the respondents in the present case "no doubt," to use the language of Farwell L.J. (1), "she is the servant of the respondents for "general purposes," and I think she was under a contract of service with them within the Workmen's Compensation Act.

In the result I think this appeal must be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitor for appellant: *W. H. Thompson.*

Solicitors for respondents: *Joynson-Hicks & Co., for Bracher, Son & Miskin, Maidstone.*

(1) [1909] 2 K. B. 820.

R. F. S.

C. A.
1938
July 22.

KAWASAKI KISEN KABUSHIKI KAISHA *v.* BANTHAM STEAMSHIP COMPANY, LIMITED.

Shipping—Charterparty—Construction—Hire—Payment to be made monthly in advance—" Punctual and regular payment "—Deadweight capacity—Hire to be calculated on tonnage—First monthly instalment of hire not paid on delivery of ship—Withdrawal of ship by shipowners —Shipowners' implied obligation to supply statement of ship's deadweight to charterers—No information to charterers as to deadweight—Withdrawal not justified.

A charterparty provided that the charterers should pay for the use and hire of the chartered ship 3*s.* 9*d.* per ton on deadweight as ascertained on delivery from builders' yard, that the payments for hire should be made in London in cash monthly in advance, and that failing the punctual and regular payment of hire the owners should be at liberty to withdraw the ship from the service of the charterers.

The chartered ship arrived at her loading port on April 13, 1937. The charterers' agent accepted the ship and requested the master to begin loading at once, which he did. No statement of the ship's deadweight had been delivered by the shipowners to the charterers, and the latter did not pay the first month's hire until 7 P.M. on the evening of April 15, when they sent a cheque to the shipowners in payment of the first month's hire and other matters. But the shipowners returned the cheque on the ground that it was out of time, and they gave notice withdrawing the ship from hire. Arbitration proceedings followed, and the question for the Court was whether the shipowners were entitled to withdraw the ship from the service of the charterers.

Branson J. held that there must be implied into the charterparty an obligation on the shipowners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity of the ship—to enable the charterers to put themselves in a position to discharge their obligation to pay the hire due under the charterparty, and that, as no such information was given by the shipowners to the charterers until after the date relied on by the shipowners as the date on which they claimed to be entitled to withdraw the ship from hire, they were not justified in withdrawing the ship from the service of the charterers :—

Held, by the Court of Appeal, that the principle that there must be implied into a contract an obligation on the one party to inform the other party of that which was within his knowledge and not within the knowledge of the other party, in order to enable the other party to discharge his obligation under the contract, was a general principle and applied to all contracts, and was not confined to contracts as between landlords and tenants with regard to repairs.

Decision of Branson J. [1938] 1 K. B. 805 affirmed.

APPEAL from a decision of Branson J. (1) upon a special case stated by arbitrators.

By a charterparty dated June 2, 1936, the shipowners let their ship, the *Nailsea Meadow*, on hire to the charterers, who were a Japanese shipping company carrying on business at Kobe, with agents in London. The ship was not then completed by the builders. The charterparty provided that the ship "estimated about 8950 tons deadweight "capacity . . . . actual deadweight and cubic to be ascertained "on delivery from builders' yard" was to proceed "across "the Atlantic in ballast to port of delivery," which, by a subsequent arrangement, became the port of Houston, in Texas. The charterparty further provided that "the said "owners agree to let and the said charterers agree to hire the "said vessel from the time of delivery for 12 calendar months."

By clause 4 of the charterparty it was provided that "the "charterers shall pay for the use and hire of the said vessel "3*s.* 9*d.* per ton on deadweight, as ascertained on delivery "from builders' yard, British sterling per calendar month "commencing on and from the day of her delivery . . . . and "at and after the same rate for any part of a month, hire "to continue until the hour of the day of her redelivery. . . . ."

By clause 5: "Payment of said hire to be made in London "in cash monthly, in advance, and for the last half month, "or part of same, the approximate amount of hire, and should "same not cover the actual time, hire is to be paid for the "balance day by day as it becomes due, if so required by the "owners, unless bank guarantee or deposit is made by the "charterers, otherwise, failing the punctual and regular "payment of hire or bank guarantee . . . . the owners shall be "at liberty to withdraw the vessel from the service of the "charterers. . . . . Delivery to count from 7 A.M. on the working "day following that on which written notice has been given

---

(1) [1938] 1 K. B. 805.

"before 4 P.M., but if required by charterers loading to commence "at once, such time to count as hire."

The ship arrived at Houston, Texas, on the morning of April 13, 1937. Certificates were issued by the charterers' agents that the ship was fit to load and certifying the amount of fuel oil and water on board. The charterers' agents accepted her and requested the master to begin loading at once, and they agreed with the master that she should be considered as having been delivered at 3 P.M. on April 13, 1937. The agents agreed to record this in a written certificate of delivery. That certificate was drawn up and was dated April 13, 1937, but was not in fact signed by either party until April 15. Further, on April 13 the master made out a written notice dated 1.30 P.M. on April 13 that the ship was ready to load, but he did not present it to the agents until 3.55 P.M. on April 15 (when he presented it at their request) because he considered that in the circumstances a notice of readiness to load was not required.

On April 14, 1937, the shipowners applied to the charterers' agents in London for payment of the first month's hire, but those agents had not then received funds from the charterers. On the following day the shipowners again applied for payment, but the charterers' agents were still unable to pay, but said that they had been advised by cable that funds were being remitted. Thereupon the shipowners gave notice withdrawing the ship from hire on the ground of non-payment. At 7 P.M. on the evening of April 15, 1937, the shipowners received a cheque for 1289*l.* 13*s.* in payment of the first month's hire and other matters, but the cheque was immediately returned. On April 15, 1937, the master, acting on cabled instructions, stopped loading at Houston at 5 P.M. On April 16 the charterers' London agents said that as the master had only handed in notice of readiness to load at 3.55 P.M. on April 15, although loading had actually begun earlier, the hire only began to run after that time, and they therefore enclosed a bankers' draft with a submission that hire would only begin to run at 7 A.M., April 16, which was equivalent to 2 P.M. London time. The shipowners returned that draft, and the dispute was submitted to arbitration.

The charterers, claimants in the arbitration, contended: (1.) That on the true construction of clause 5 of the charterparty the shipowners had no right to withdraw the ship from the charterers' service on non-payment of the first month's hire. (2.) That no hire became due until the shipowners claimed it and notified the charterers of the actual deadweight as ascertained from the builders of the vessel. (3.) That in fact payment of the first month's hire was made in strict accordance with the terms of the charterparty. (4.) That payment was made promptly within a reasonable interpretation of the obligations of the parties.

The shipowners contended: (1.) That on the facts and on the true construction of the charterparty they were entitled to withdraw the ship from the service of the charterers. (2.) That the charterparty called for the punctual and regular payment of the hire and that such punctual and regular payment was not made or tendered.

Subject to the opinion of the Court on a special case the arbitrators awarded that the shipowners were not entitled to withdraw the ship from the service of the charterers.

The question for the opinion of the Court was whether on the facts found and on the true construction of the charterparty the shipowners were entitled to withdraw the ship from the service of the charterers.

Branson J. held that there must be implied into the charterparty an obligation on the shipowners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity of the ship—to enable the charterers to put themselves in a position to discharge their obligation to pay the hire due under the charterparty, and that, as no such information was given by the shipowners to the charterers until after the date relied on by the shipowners as the date on which they claimed to be entitled to withdraw the ship from hire, they were not justified in withdrawing the ship from the service of the charterers.

The shipowners appealed.

A. T. Miller K.C. and *Cyril Miller* for the appellants. The decision of Branson J. was wrong. He applied to the present case the principle of the landlord and tenant cases, which requires notice to be given to a lessor calling upon him to repair the demised premises in accordance with his covenant before proceedings are taken to obtain damages for the breach of covenant. That principle is based upon the inability of one party to know what is within the knowledge of the other party. In the present case the charterers could, through their agents, know as much about the deadweight capacity of the vessel as the shipowners by looking at the deadweight scale in the master's cabin. The charterers contract to pay hire upon the deadweight capacity of the ship; they must, therefore, themselves make the necessary calculations. If the charterers wanted to put upon the shipowners the duty to inform them of the amount of the deadweight capacity, they ought to have expressly asked that that should be done. The charterers had the opportunity of seeing the deadweight scale before the vessel was handed over by the builders.

[GREER L.J. This was not a demise of the ship and consequently the charterers would not have a right of entry to the ship in order to ascertain what was her deadweight capacity.]

In all probability the builders never contracted to inform the shipowners what the dimensions and deadweight capacity of the ship were, but as a matter of practice the builders make the necessary calculations and the result becomes known to all who are interested in the ship. The charterers and any person interested in the ship could have obtained the deadweight capacity of the ship from the builders. This charterparty is a business document and it can be construed without implying in it a term that the shipowners shall inform the charterers the deadweight capacity of the ship. Lord Esher M.R. said in *Hamlyn & Co.* v. *Wood & Co.* (1): "I have for a long time understood that rule to "be that the Court has no right to imply in a written contract

---

(1) [1891] 2 Q. B. 488, 491.

"any such stipulation, unless, on considering the terms of the "contract in a reasonable and business manner, an implication "necessarily arises that the parties must have intended "that the suggested stipulation should exist." The charterparty imposed an obligation upon the charterers to have their money for hire ready and to pay it in advance. Therefore the charterers were under an obligation to make inquiries in order to find out the deadweight capacity of the vessel. The only person who makes the necessary calculation in order to find out the deadweight capacity is the builder of the vessel. If the charterers had asked the builders they would have been told what the deadweight capacity of the vessel was. This case is quite unlike the landlord and tenant cases with regard to the liability of the landlord to do repairs. In those cases the time when the repairs require to be done is uncertain, and the landlord, who is not in occupation of the premises, is not in a position to know, and cannot know, when the repairs ought to be done, whereas the tenant, who is in occupation of the premises, does know when the repairs are necessary. In the present case the only notice that is required to be given is a notice that the ship is ready to load. It was held by the Court of Appeal in *Tyrer & Co.* v. *Hessler & Co.* (1) that shipowners were not bound to make a demand for payment of hire before exercising the right of withdrawal. In that case, as in the present case, payment of the hire had to be made in advance, and in default of such payment the owners had the right of withdrawing the steamer from the service of the charterers. In that case, however, the amount payable was a fixed amount.

[SLESSER L.J. The principle that there must be implied into a contract an obligation on one party to inform the other party that which was within his knowledge and not within the knowledge of the other party, in order to enable that other party to discharge his obligation under the contract, is a general principle and applies to all contracts and is not confined to contracts as between landlords and tenants with regard to repairs: see *Vyse* v. *Wakefield*. (2)]

(1) (1902) 7 Com. Cas. 166.

(2) (1840) 6 M. & W. 442.

C. A.
1938

KAWASAKI KISEN KABUSHIKI KAISHA
v.
BANTHAM STEAMSHIP CO.

Parke B. said in *Vyse* v. *Wakefield* (1) that " the general rule "is, that a party is not entitled to notice, unless he has "stipulated for it ; but there are certain cases where from "the very nature of the transaction, the law requires notice "to be given though not expressly stipulated for." The present case does not come within those cases mentioned by the learned judge. The deadweight of a vessel does not lie within the peculiar knowledge of the shipowner. There is no obligation upon the shipowner to inform the charterers what is the measure of their obligation to pay hire. The charterers must find out how much they have to pay. It could not have been intended that a term should be implied in the charterparty that the shipowners should inform the charterers of the deadweight capacity of the ship and the amount of hire the charterers have to pay, otherwise the charterers were not to be under an obligation to pay any hire. In construing a commercial document such as a charterparty the Court will not read implications into it such as is done in landlord and tenant cases. Lord Sumner said in *Murphy* v. *Hurly* (2) : " The rule requiring a notice of want of repair "by the tenant to the landlord, in the case of an ordinary "landlord's repairing covenant for dwelling houses, ware"houses and similar structures, is well settled, and no one "proposes to alter or restrict it. The nature and the conditions "of this rule are, however, equally well settled. As a rule "of construction, which reads into the covenant words— "namely, ' upon notice '—which are not there, its application "naturally depends on the existence of those strong circum"stances of necessity, which alone justify the implication "of a condition upon an obligation, which is itself expressed "unconditionally. Those circumstances are (1.) that the "tenant is in occupation and the landlord is not ; (2.) that "the tenant, therefore, has the means of knowledge peculiarly "in his possession, while the landlord has no right of access "and no means of knowing the condition of the structure "from time to time (see per Collins M.R. in *Tredway* v.

---

(1) 6 M. & W. 442, 453.

(2) [1922] 1 A. C. 369, 387.

"*Machin* (1)); and (3.) perhaps, I may add, that the repairs "of dwelling-houses, however frequently required, are still "casual and occasional, and not, as here, such as to demand "of the landlord incessant vigilance and almost daily care." That passage strongly supports the present contention. There is no proper basis on which this implied term can be rested.

Sir Robert Aske K.C. and *W. L. McNair*, for the respondents, were not called upon.

GREER L.J. We need not trouble you, Sir Robert.

This is a case arising out of the obligations under a charterparty between the charterers and the shipowners. The learned judge has held that the principle which has been mainly applied in cases between landlord and tenant is not confined to those cases and may be used for the purpose of determining the issues which arise in this case. I regard the decision of the arbitrators as meaning that the charterers had not been informed and did not know what was the deadweight of the vessel and that they had had no opportunity of ascertaining that fact. The charterparty was not a demise of the ship. The undertaking of the charterers was fulfilled by loading the ship at the port of loading. They had no right to board the ship to search her, or to send a surveyor on board to make the calculations as to what her deadweight was at the time when she was delivered by the shipbuilders to the shipowner. The material clause in the charterparty is clause 5. The charterparty says: "this charterparty made and concluded ". . . . between Bantham Steamship Company, Ld., "owners of the good steamship *Nailsea*. . . . . (to be named) ". . . . of about 545,429 cubic feet grain capacity and "estimated about 8950 tons deadweight capacity . . . . "(actual deadweight and cubic to be ascertained on delivery "from builders' yard)." By clause 4 it was provided that "the charterers shall pay for the use and hire of the said "vessel 3*s.* 9*d.* per ton on deadweight, as ascertained on

---

(1) (1904) 91 L. T. 310, 311.

"delivery from the builders' yard. . . . ." By clause 5: "Payment of the said hire to be made in London in "cash monthly, in advance . . . . otherwise, failing the "punctual and regular payment of hire . . . . the owners "shall be at liberty to withdraw the vessel from the service "of the charterers. . . . ." There has been no evidence that the charterers were present at the time when the ship was delivered from the builders' yard, and there has been no evidence that they ever had any other opportunity of obtaining any information as to the deadweight of the ship. They had no opportunity of ascertaining what the actual deadweight was; but, on the other hand, the shipowners being throughout in possession of their ship were able to know what the deadweight was at the material time. The learned judge was entitled to come to the conclusion that the shipowners, being in sole possession of the ship, and being alone responsible for what information they received from the shipbuilders at the time when the ship was delivered to them by the shipbuilders (which was about six months before any charterparty began), were under an obligation, before they enforced their rights to forfeit the charterparty, to give information, which was within their knowledge. They did not do so and, not having done so, the shipowners failed to fulfil that which they had to perform before the obligation of the charterers under the charterparty with regard to the payment of hire came into existence.

We have not thought it necessary to hear Sir Robert Aske in regard to the other points with which the learned judge dealt, and we are not deciding any point except the one which has been raised by Mr. A. T. Miller. It may be that the respondents could have supported the decision of the learned judge on grounds other than those which were given by the learned judge; but we do not deal with them and they are open, if the case goes beyond this Court, to whoever then argues the case on behalf of the respondents. I hesitated to decide this case without calling upon the respondents, but having regard to the considerable work that we have to do next week, we decided to dispose of this case now without calling upon the respondents to assist the Court by putting their views before us. There can be no doubt from the cases which have been referred to: *Tyrer & Co.* v. *Hessler & Co.* (1) and *Murphy* v. *Hurly* (2), and *Tredway* v. *Machin* (3) which was referred to by several of the learned Lords in *Murphy* v. *Hurly* (2), that the principle on which the learned judge relied is not confined to cases between landlord and tenant. It depends upon there being an implied term in every contract, where one of the parties has a means of knowledge and the other party has not the means of knowledge, that there should be, before the forfeiture is insisted upon, information by the party who knows to the party who does not know. For these reasons I think this appeal must be dismissed, with costs.

SLESSER L.J. I agree. The case of *Tredway* v. *Machin* (3), which has been mentioned in argument, is a case of a landlord and tenant, but the general observation of Collins M.R. seems to be in point here. He says this (4): "The law upon the subject has been repeatedly laid down "and stated. The landlord is not liable unless there is a "contract by him to keep the premises in repair; and he is "not liable even in that case unless he has had express notice "of the want of repair. That rule rests upon the principle "that the landlord is not the occupier of the premises, and "has no means of knowing what is the condition of the premises "unless he is told, because he has no right of access to the "demised premises, whereas the occupier has the best means "of knowing of any want of repair." Lord Atkinson, in *Murphy* v. *Hurly* (2) speaks in the same way. He says (5): "These authorities, I think, establish that the duty of the "tenant to give notice springs from the special knowledge "of the need of repairs which his occupancy of the demised "premises is presumed to give him, coupled with the state "of ignorance of that need in which the absence of such

---

(1) 7 Com. Cas. 166.
(2) [1922] 1 A. C. 369.
(3) 91 L. T. 310.
(4) 91 L. T. 311.
(5) [1922] 1 A. C. 369, 383.

C. A.
1938

KAWASAKI KISEN KABUSHIKI KAISHA *v.* BANTHAM STEAMSHIP CO.

Slesser L.J.

"occupancy is presumed to leave the landlord." Now applying those principles to this case, on the facts, as stated in the case, there is to be presumed a knowledge of the deadweight of this vessel by the owners, but there is no reason to presume anything but ignorance of the amount of the deadweight upon which the amount of the hire is to be fixed in the minds of the charterers who have not, at the time of the delivery of the vessel, any right or any opportunity, unless they have the knowledge presented to them or come by it by accident, to know that which it is essential for them to know in order that they may discharge their obligations under the charterparty. It seems to me that, when the principle laid down in cases of landlord and tenant, which, as my Lord has said, has been applied to many other cases, is considered, it must result here in a conclusion, which has found favour both with the arbitrators and with the learned judge, that this is one of those cases where the special knowledge must be presumed to be with the owner and not with the charterer. I agree, therefore, that this appeal fails.

MACKINNON L.J. I agree, and I do not think I can usefully add anything.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover, for Allen Pratt & Geldard, Cardiff.*

Solicitors for respondents: *Thomas Cooper & Co.*

R. F. S.

HIRSCHORN *v.* EVANS (BARCLAYS BANK, LIMITED, GARNISHEES).

C. A.
1938
July 14, 15.

Banker—Customer—Joint account in name of husband and wife—Judgment against husband—Attachment of debts—Garnishee order—Service on bank—Liability of bank in respect of joint account.

A husband and wife opened a joint account with the B. bank in February, 1935, upon the terms that the signature of either would be a sufficient discharge for the repayment of any moneys deposited with the bank. The wife had received a legacy of 1000*l.* in 1930 which she handed to her husband to be used in his business. In January, 1936, H., who had supplied building material to the husband for use in his business, recovered judgment against him. On January 15, 1938, a garnishee summons was served upon the B. bank attaching so much of the debts due from the bank to the judgment debtor as would satisfy the debt of 15*l.* 7*s.* due to H. under the judgment. On January 15, 1938, the B. bank had no account in their books in the name of the husband, but they had the joint account standing in the names of the husband and the wife. That account was on that date in credit in the sum of 114*l.* The bank, considering that the garnishee summons did not attach any part of their debt on the joint account, honoured cheques drawn on the joint account with the result that by February 22 the joint account was overdrawn and there was no balance left in that account. On the hearing of the garnishee summons on February 22 the county court judge held that the money in the joint account was the sole property of the husband, and that it was a debt due by the bank to the husband. He accordingly gave judgment for the plaintiff against the garnishees. On appeal:—

Held, by the Court of Appeal, that there was no evidence upon which the county court judge could find that the money in the joint account belonged solely to the husband.

Held, further, by Slesser and MacKinnon L.JJ. (Greer L.J. dissenting), that inasmuch as the debt which the bank owed was not a debt due to the husband alone but to him jointly with his wife, it could not be attached to answer the judgment against the husband.

Macdonald v. *Tacquah Gold Mines Co.* (1884) 13 Q. B. D. 535 applied and followed.

APPEAL from a decision of His Honour Judge Ralph Thomas sitting at the Mayor's and City of London Court.

The judgment debtor, Lionel C. Evans, carried on business as a builder under the name of the Hampstead Construction Company.

In 1930 the judgment debtor's wife, Mrs. Elaine Evans, had a legacy of 1000*l.* left to her by an aunt. Mrs. Evans handed this money over to her husband to be used in the business. The wife, in giving evidence, said she was a partner. The county court judge, however, was not satisfied that there ever was any partnership between the wife and husband.

On February 8, 1935, the judgment debtor, Lionel Evans, and his wife, Elaine Evans, opened a joint account with Barclays Bank, Highgate branch, in the following terms: "We request you to receive money from time to time to "the credit of this account and hereby authorise you to "accept the signature of either" of us "jointly severally or "the signature of the survivors or survivor as a sufficient "discharge for the repayment of any monies so deposited "with you." That was signed by Lionel Evans and Elaine Evans, his wife.

On January 17, 1936, the judgment creditor, Charles Hirschorn, who had been supplying building material to the firm which was being run by the judgment debtor, recovered judgment against the judgment debtor for 15*l.* 12*s.* 6*d.* and 1*l.* 18*s.* 6*d.* for costs, which judgment remained unsatisfied as to the sum of 13*l.* 11*s.*

On January 15, 1938, a garnishee summons was served on Barclays Bank. It recited that the judgment creditor on January 17, 1936, recovered judgment against the judgment debtor for payment of the sum of 15*l.* 12*s.* 6*d.* and costs. It also recited that "the judgment creditor had filed an "affidavit stating that you"—the bank—"are indebted to "the said judgment debtor in the sum of 20*l.*" The summons then said: "You are hereby summoned to appear at court "to shew cause why an order should not be made upon you "for the payment to the judgment creditor of the amount "of the debt due and owing or accruing from you to the said "judgment debtor" and "Take notice that from and after "the service of this summons upon you so much of the debts "owing or accruing from you to the judgment debtor as will "satisfy the debt due under the said judgment . . . . are "attached to answer this summons." The total amount for which the summons was issued was stated to be 15*l.* 7*s.*, being 13*l.* 11*s.* the amount remaining due under the judgment and 1*l.* 16*s.* for costs.

On January 15, 1938, Barclays Bank had no account in their books in the name of Lionel Evans, but they had an account in the names of Lionel Evans and his wife, Elaine Evans. On January 15, 1938, that joint account was in credit to the amount of 114*l.* 7*s.* 5*d.* As that account was in the joint names of the husband and wife and not in the name of the judgment debtor, the bank took the view that the summons did not attach any part of their debt on the joint account, and they could not dishonour cheques drawn on the joint account. The bank accordingly honoured cheques drawn on the joint account with the result that by February 22 the account was overdrawn and there was no balance left in the joint account.

Upon the hearing of the garnishee summons on February 22 the county court judge found that the money in the joint account was the sole property of the husband, and that it was a debt by the bank to the husband. At any rate there was in the account on January 15, 1938, 13*l.* 11*s.* which belonged to the husband. The county court judge said that it had been suggested that it would be a great hardship on the bank if they were liable for this garnishee. From the practical point of view, so far as the money was concerned, that was their fault because they went on honouring cheques until there was an overdraft in spite of the garnishee order nisi. So far as the question of principle was concerned he saw no more difficulty in the case than in a case where the bank had an account in one name and it turned out that the money was the property of some one else. There would be judgment against the garnishees for 13*l.* 11*s.* with costs.

The garnishees (Barclays Bank, Ld.) appealed.

W. N. Stable K.C. and *George Bankes* for the appellant bank. The county court judge was wrong in holding that the garnishee order nisi attaching all debts due to the judgment debtor, Evans, operated to bind the credit balance in the bank standing to the credit of the joint account of Evans and his wife. A debt is a legal chose in action and the question to whom it belongs depends upon who has the legal right to sue for it. In the present case the husband and the wife jointly had the right to sue the bank for the balance standing to the credit of their joint account. The relation between a bank and its customer is solely that of debtor and creditor: *Foley* v. *Hill.* (1) As between a bank and its customer the debt which the bank owes to its customer is a legal chose in action. In the present case the contract in respect of the joint account was between the bank and the husband and wife, and an action against the bank to recover the balance standing to the credit of the joint account must be brought by the husband and wife together. There never was a debt due from the bank to the husband.

[GREER L.J. There was no evidence from which the county court judge could draw the inference that the money in the joint account belonged solely to the husband.]

The bank is only concerned with the legal debt and is not bound to adjudicate on the conflicting equities of the husband and wife to the money in the joint account. It was held in *Plunkett* v. *Barclays Bank* (2) that money standing to the credit of a client account which the plaintiff, a solicitor, had opened with the defendant bank was a debt owing from the bank to the plaintiff, in whose name the account was opened, notwithstanding that the money in that account was client's money, and that a garnishee order nisi, served on the bank in respect of debts owing or accruing due from the bank to the plaintiff, bound that debt in the hands of the bank. It was held in *Macdonald* v. *Tacquah Gold Mines Co.* (3) that a debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to the judgment debtor alone, and that where it is only due to him jointly with another person it cannot be so attached. That decision is directly in point in the present case and is conclusive in favour of the appellants. The only possible test as to the person to whom the money in the joint account was due is the question with whom the contract was made by the bank. In the present case it was made with the husband and wife jointly. [*Harrods, Ld.* v. *Tester* (1) and *Koch* v. *Mineral Ore Syndicate* (*London and South Western Bank, Garnishees*) (2) were also cited.]

---

(1) (1848) 2 H. L. C. 28.
(2) [1936] 2 K. B. 107.
(3) 13 Q. B. D. 535.

C. A.
1938
HIRSCHORN
v.
EVANS.

N. Ker Lindsay for the respondent, the execution creditor. The decision of the county court judge was correct. The plaintiffs supplied the judgment debtor, Evans, with building material. This joint account is the only banking account in which Evans is interested. The county court judge found as a fact that at the time the garnishee order nisi was served on the bank there was a debt due from the bank to the judgment debtor of sufficient amount to cover the judgment debt. There was evidence upon which the county court judge could find that the money which was paid into the joint account belonged to the husband, and that therefore there was a debt due from the bank to the husband. The county court judge accepted the wife's evidence except when she said she was a partner. The evidence was sufficient for the county court judge to find that the money in the joint account at the time the garnishee order nisi was served on the bank belonged to the husband. The joint account was opened in the names of the husband and the wife on February 8, 1935. The wife had received a legacy of 1000*l.* from her aunt in 1930, which she handed over to her husband to be used in the business. In August, 1936, there was an agreement by the husband and wife with the bank for an overdraft, and therefore it must be presumed that by that time the wife's 1000*l.* had been exhausted. The wife had had no money of her own since the joint account was opened in February, 1935. Therefore the money that went into the joint account was derived from the husband's business. It was held in

---

(1) (1937) 157 L. T. 7.

(2) (1910) 54 Sol. J. 600.

C. A.
1938
HIRSCHORN
v.
EVANS.

Marshal v. *Crutwell* (1) where a husband opened a joint account in the names of himself and his wife, it being a mere arrangement for convenience and not intended for a provision for the wife in the event of the husband's death, that the money in the account belonged on the husband's death to his executors and not to the wife.

[MacKinnon L.J. That case was not one in which a bank was concerned. It is no authority for the contention that a debt was due in the present case by the bank to the husband.]

That case shows that the wife had no right to the money in the joint account. The wife was a customer of the bank for any sums for which she drew a cheque on the bank. Cheques drawn on the joint account by either the husband or the wife would be honoured by the bank. There was sufficient money in the joint account at the time the garnishee order nisi was served on the bank to satisfy the judgment debt. The crucial question was in whom was the equitable right to the money in the joint account. The wife had no right in equity to the money: see *Hancock* v. *Smith.* (2) The decision in *Harrods Ld.* v. *Tester* (3) completely destroys the argument advanced on behalf of the appellant bank, because in that case the account was in the name of the wife and it was nevertheless held by the Court of Appeal that the money in the account belonged to the husband. Inasmuch as this account could be operated by cheques drawn by either husband or wife it was not strictly a joint account but a joint and several account. Banks regard an account as a joint account where cheques drawn on the account have to be signed by both customers. The service of the garnishee order nisi operated as a demand upon the bank by operation of law: *Joachimson* v. *Swiss Bank Corporation,* per Bankes L.J. (4): it was equivalent to a cheque drawn upon the bank by the husband. After the service of the garnishee order nisi upon the bank the bank is estopped from saying that the husband was not entitled to draw the amount for which the garnishee order nisi was obtained out of the joint account.

---

(1) (1875) L. R. 20 Eq. 328.
(2) (1889) 41 Ch. D. 456.
(3) 157 L. T. 7.
(4) [1921] 3 K. B. 110, 121.

[SLESSER L.J. referred to *Beasley* v. *Roney*. (1)]

That case is distinguishable on the facts because there the account was a joint account whereas in the present case it is a joint and several account. The real test is who can give a discharge to the bank for the whole of the debt due from the bank. In the present case either the husband or the wife could give a discharge to the bank for the debt. The bank as garnishees could under Order XXVII., r. 7, of the County Court Rules, 1936, when they were served with the garnishee summons, have paid into Court the amount claimed on the garnishee summons in which case all costs would have been saved.

GREER L.J. In this case I have the misfortune to differ from my two brethren on the main question. It is a matter of no consequence, because I am satisfied that the learned judge had no evidence before him which justified him in coming to the conclusion that the debt owed by the bank was due solely to the husband, because it had originated only in money provided by the husband. The only evidence given was the evidence of the wife, and she leaves it undetermined whether or not the balance of 1000*l.* which had been left to her at an earlier date was or was not transferred into this account, and it is consistent with her evidence that the account was an account which consisted in part of moneys provided by her and in part of moneys provided by the husband. There was no ground on which the learned judge could find that the whole of the moneys in this account had been provided by the husband, and that therefore the account was the husband's account and not the wife's account at all. The mere fact that the learned judge did not accept the wife's account did not provide evidence to the contrary of what the wife said. The fact that you do not believe evidence given for the defendant cannot make evidence for the plaintiff in any case. It seems to me, therefore, that the learned judge

(1) [1891] 1 Q. B. 509.

C. A.
1938

HIRSCHORN
v.
EVANS.

Greer L.J.

was wrong in the conclusion that he came to on the ground that there was no evidence which justified that conclusion.

If and in so far as it is necessary to decide the other point, the inclination of my mind is to think that Mr. Stable has not made out his point. The only case, I think, to which I need refer in support of the opinion I have formed is the decision of Bankes L.J. and Atkin L.J. in the case of *Joachimson* v. *Swiss Bank Corporation.* (1) In that case Bankes L.J. used these words (2): "Applying Lord Esher's test, as laid down in "*Hamlyn* v. *Wood* (3), to the question whether the term "contended for by the appellants must be implied in the "contract between banker and customer, I have no hesitation "in saying that it must. It seems to me impossible to "imagine the relation between banker and customer, as it "exists to-day, without the stipulation that, if the customer "seeks to withdraw his loan, he must make application to "the banker for it. It has been suggested that a decision to "this effect would run counter to a line of authorities which "have recognised and allowed garnishee proceedings in reference "to amounts standing to a customer's credit on his current "account, upon the ground that such amounts were debts "capable of being attached. I do not agree with this suggestion. "The effect of the service of a garnishee order nisi is, according "to Lord Watson in *Rogers* v. *Whiteley* (4), to make the "garnishee 'custodier for the Court of the whole funds "'attached.' The service of such an order is, in my opinion, "a sufficient demand by operation of law, to satisfy any right "a banker may have as between himself and his customer "to a demand before payment of moneys standing to the "credit of a current account can be enforced. As no demand "for payment in the present case was made on or before "August 1, 1914, it follows, in my opinion, that the plaintiffs "had no accrued cause of action on that date, and the claim "fails on that ground." I regard the views of Atkin L.J., now Lord Atkin, as agreeing with what was laid down in Bankes L.J.'s judgment.

(1) [1921] 3 K. B. 110.
(2) Ibid. 121.
(3) [1891] 2 Q. B. 488, 491.
(4) [1892] A. C. 118, 122.

C. A.
1938

HIRSCHORN
v.
EVANS.

Greer L.J.

If that is so, it seems to me practically conclusive of this case, because if the garnishee summons was equivalent to a demand by the husband, the husband having the right as well as his wife to demand the payment of the sum and afterwards moneys were paid on the husband's cheque by the bank, the bank cannot rely on the payment of that which had been already demanded through the garnishee summons by the husband for the purpose of the execution creditor. I am inclined to think that that view is supported by the decision of the learned judges in *Harrods, Ld.* v. *Tester* (1), though the point did not directly arise in that case. I think it is involved in the decision of the county court that the husband and the husband alone had a title to the debt which remained owing to whoever was the true owner of the debt which the Bank owed to the true owner.

I am not impressed by the difficulty that a decision on those lines will put the bank in. The bank is in no better position than any other debtor. The debtor has to find his creditor and pay his creditor where he finds him, and if there is a difficulty about that, then the bank has to run the risk of making a mistake by paying somebody whom the bank ought not to pay. In the present case there is no real difficulty in the way of the bank because under the County Court Rules, Order XXVII., r. 7, the bank could at the time they were served with the garnishee proceedings have paid the money into Court and then said: "It is no concern of mine whether "this ought to be paid to the garnishor of the bank's debt "to the husband or whether the bank owed the money to the "wife. I will let these two people fight it out amongst "themselves." The bank was really put in no difficulty whatever.

We have had quite a number of cases cited to us, but I do not think that any of them really touch the real point in the case, and I should like to say with regard to *Marshal* v. *Crutwell* (2) that in my judgment it has nothing whatever to do with the point which we have to decide in the present case. On general principles I am against the argument which

(1) 157 L. T. 7.

(2) L. R. 20 Eq. 328.

has been put forward on behalf of the bank, though I think it does not matter in the result because I agree with my brethren that this appeal must be allowed on the ground that there was no evidence on which the county court judge could find that the money in the joint account belonged solely to the husband.

SLESSER L.J. On February 8, 1935, the judgment debtor, Lionel Evans, and his wife opened a joint account with Barclays Bank, Highgate Branch, in the following terms: "We request you to receive money from time to time to "the credit of this account and hereby authorise you to "accept the signature of either"—of us—" or the signa-"ture of the survivors or survivor as a sufficient discharge "for the repayment of any moneys so deposited with "you." That is signed by Lionel Evans and Elaine Evans, his wife.

On January 17, 1936, the judgment creditor, Charles Hirschorn, who had been supplying building material to the firm which was being run by the judgment debtor, called the Hampstead Construction Co., recovered judgment for 15*l*. 12*s*. 6*d*. and certain costs. On January 15, 1938, a garnishee summons was served upon the bank which recited that " the judgment "creditor has filed an affidavit stating that you"—the bank— "are indebted to the said judgment debtor"—Lionel Evans— "in the sum of 20*l*."

On that, the principal question which arises, in my opinion, is this: whether it was the fact that the bank at that time were so indebted to the judgment debtor as there stated. In my view the right construction to put upon the opening of the account on February 8, 1935, notwithstanding the fact that authority was thereby given both to the judgment debtor and to his wife to sign cheques, is that that account was a joint account. I entertain no doubt that if the bank had failed to meet its obligations the rights under this account could only have been exercised by both the persons, the husband and the wife, joining in whatever claim might be appropriate under the account.

C. A.
1938
HIRSCHORN
v.
EVANS.
Slesser L.J.

Now, if that view be the right one, I think that the case falls within the principle stated in *Macdonald* v. *Tacquah Gold Mines Co.* (1) That was a case in some ways simpler than this one because there was there payable to two persons, one Horton and one Fitzgerald, a debt from a certain company in South Africa. The judgment creditor, one Macdonald, sought to garnishee this company in South Africa in respect of a debt of Fitzgerald alone, and it appears that of the total sum owing both to Horton and to Fitzgerald in equity a certain proportion would have been ultimately the property of Fitzgerald, but it is pointed out there that it could not be said that it was " either a legal debt or a liquidated sum owing "in equity to Fitzgerald, for equity would never have "entertained an action for it brought by Fitzgerald alone "without making Horton a party." That statement of Lord Esher (2) seems to be material here apart from the view which my Lord has expressed that there is here no evidence that the money in this account was solely the property of the husband, as the learned judge has found, in that the wife was made no party to the proceedings, and although she has given evidence, which was perhaps not accepted, she has not been heard to say whether she does or does not make any claim to this property. I do not think in her absence that it would be possible for this Court to come to any conclusion as to whether the amount, though legally in the names of these two persons, was in equity solely the property of the husband, the wife merely being upon the account as trustee.

However that may be, I think that the observations made by all three learned judges in *Macdonald* v. *Tacquah Gold Mines Co.* (1) are in point. It is said in that case that the company were indebted in the liquidated sum or debt payable to Horton and Fitzgerald jointly, but not to either of them alone. There was no debt due in respect of this sum from Horton to Fitzgerald, nor could there be until the money had been paid by Horton to the Company. Bowen L.J. observed (3): " Where money is due on a covenant made

---

(1) 13 Q. B. D. 535.
(2) Ibid. 538.
(3) Ibid. 539.

C. A.
1938
HIRSCHORN
v.
EVANS.
Slesser L.J.

"with two persons jointly by which it is to be paid to such "two jointly, no one of those two has any right to that "money without the other of them," and Fry L.J. said (1): "I adhere to what was said by this Court in *Webb* v. "*Stenton* (2) as to the word 'indebted' in that rule. Then "can it be said that the defendant company was indebted "to the judgment debtor when they were indebted to "him and another person jointly only? It seems "clearly it cannot, and that the words of the rule are not "applicable to such a case. If they were, the result would "be to enable a judgment creditor to attach a debt due to "two persons in order to answer for the debt due to him from "the judgment debtor alone, which would be altogether "contrary to justice."

Now, what is said here is this, that in so far as each of these persons has the right to demand payment of the money in the account under the specific authorization to accept the signature of either of them, that this account is in its nature several as well as joint. I am unable to accept that view. It seems to me that it amounts to no more than this; the bank are under an obligation to meet the demand at any time of either the husband or the wife, and to that extent when that demand is dishonoured the bank would be responsible for failure to meet that payment. If the argument here for the judgment creditor be well founded, it would follow that the bank would be in this dilemma, that the whole account being sterilized owing to the operation of this Order, they would be unable to meet the demands of the wife which she is entitled under the contract with the bank to make, because that would be prevented by an order which, on the face of it, applies only to the husband. I cannot think that any such position arises merely because each party may, as regards a specific cheque, create a specific debt in relation to that matter.

I think one has to look at the account as a whole, and, looking at the account as a whole, I think it is in the nature of a joint account on which the bank are jointly liable to both parties

(1) 13 Q. B. D. 539. (2) (1883) 11 Q. B. D. 518.

C. A.
1938

HIRSCHORN
v.
EVANS.

and, consequently, the garnishee summons is misconceived in stating that the bank are indebted to the said judgment debtor in the sum there stated, whereas, in reality, they are jointly indebted both to the judgment debtor and to his wife.

As I have just indicated, I think that the case of *Macdonald* v. *Tacquah Gold Mines Co.* (1) and other cases which have since approved it, determine this case, therefore, in favour of the bank.

MACKINNON L.J. Rather more than 24 hours ago I felt satisfied that on principle and on the application of pure law the judgment appealed from in this case was wrong, and that no authorities need be cited to establish that proposition. Since then, various authorities have been cited and all of them have confirmed me in that original opinion.

On January 15, 1938, this document was served on the bank; it is headed " Summons to garnishee " and it sets out " Charles "Hirschorn, judgment creditor, Lionel Evans, judgment "debtor, Barclays Bank Ltd., garnishees." It recites that the judgment creditors obtained a judgment for 15*l.* odd against the judgment debtor. It recites that " The judgment creditor "has filed an affidavit stating that you "—the bank—" are "indebted to the judgment debtor in the sum of 20*l.* " and it then says " You are hereby summoned to appear at Court to "show cause why an Order should not be made upon you "for the payment to the judgment creditor of the amount "of the debt due and owing or accruing from you to the said "judgment debtor " and " Take notice that from and after "the service of this summons upon you so much of the debts "owing or accruing from you to the judgment debtor as will "satisfy the debt due . . . . are attached to answer the said "judgment." Then, the amount, the total for which the summons is issued, is specified as 15*l.* 7*s.*

If upon receiving that summons the bank had any account open in their books in the name of Lionel Evans, the judgment debtor, it would have been their duty not to allow Lionel

---

(1) 13 Q. B. D. 535.

C. A.
1938

HIRSCHORN v. EVANS.

MacKinnon L.J.

Evans to draw cheques upon that account so as to reduce the credit balance below the sum of 15*l.* 7*s.* That obligation would attach as regards any account in the name of Lionel Evans, even if the bank had the strongest reason to suppose that Lionel Evans was only a trustee or that for any other reason he had not the full beneficial interest in the account.

In fact, on January 15, 1938, the bank had no account in their books in the name of Lionel Evans. They had an account in the names of Lionel Evans and his wife, Elaine Evans. I am quite satisfied that that was a joint account. It is true that there was an authority on the bank to honour cheques upon that joint account if the cheques were signed by one or other of them. That simply means: "Either of us "has authority on behalf of and as agent for both of us to "sign cheques." It would amount to no more than an authorization to the bank:—"Upon this our joint account "you are authorised to honour cheques drawn by our clerk "or agent, John Smith." But such an authorization would not make the bank the debtor of John Smith.

On that account the bank were debtors for any balance to Lionel Evans and Elaine Evans jointly. They were not debtors on that account to Lionel Evans. On January 15 that joint account was in credit to the amount of 114*l.* 7*s.* 5*d.* If it had been an account in the name of Lionel Evans only, the bank would have been bound not to honour cheques drawn on it so as to reduce that credit balance below 15*l.* 7*s.* As the account was in the joint names and not in the name of the judgment debtor, the bank took the view that the summons did not attach any part of their debt on the joint account, and they could not dishonour cheques drawn on the joint account. I think they were right in that view. Indeed, if they had dishonoured cheques, I think they could have been sued by the joint creditors for so doing.

If authority be needed, it can be supplied by part of a single sentence in the judgment of Pollock B. in the case of *Beasley* v. *Roney* (1) in these words:—" the debt owing by a "garnishee to a judgment debtor which can be attached to

---

(1) [1891] 1 Q. B. 509, 512.

"answer the judgment debt must be a debt due to the judgment "debtor alone, and that where it is only due to him jointly "with another it cannot be attached."

The bank taking that view, and, as I think, rightly taking that view, in the result, cheques were drawn on the joint account and were honoured by the bank, so that by February 22 the account was overdrawn and there was no balance at all. In those circumstances, on February 22, the garnishee summons came on for hearing. The judge held that the bank must pay 13*l.* 11*s.* That was on the basis that on receiving the summons of January 15, the bank were bound to dishonour thenceforward any cheques on the joint account so that it should not be drawn below the amount specified in the summons, and this duty was alleged to arise because the money in the account really belonged to the husband. The learned judge's judgment ends with the words: "So far "as the question of principle is concerned, I see no more "difficulty in this case than in a case where they have got "the account in one name and it turns out that the money "is the property of somebody else." That seems to be couched in popular language. There is, of course, never any question of property in the credit balance of a bank account. The relation of banker and customer is simply that of debtor and creditor. But if the popular language used by the county court judge means, as it appears to do, that when a garnishee order in regard to some named judgment debtor is served on a bank, the bank must at its peril hold up any account in any one's name in which the judgment creditor can subsequently prove that the judgment debtor had an interest as principal, cestui que trust, or in any other way, I think that that proposition is utterly wrong and that its enforcement would impose an unjustified and intolerable burden on the bank. I think that the judgment for these reasons was wrong and this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Richards, Butler & Co.*
Solicitors for respondent: *Craigen, Hicks & Co.*

R. F. S.

C. A.

1938

July 18.

POTELIAKHOFF *v.* TEAKLE.

Gaming—Gambling debt—Cheque given in payment of debt—Dishonour of cheque—Threat of publicity by bringing action on cheque—Forbearance to sue—Promise to pay cheque by instalments—Whether new consideration—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18.

The plaintiff owned a club for the playing of card games and gambling. The defendant came to the club and played and lost. He gave the plaintiff a cheque for 74*l.* in respect of that gambling debt. The cheque was dishonoured on presentation. The defendant was extremely anxious that the fact that he owed this gaming debt should not become known, as he already had a considerable overdraft at his bank and the bank manager had warned him against drawing any substantial cheques on his account. The plaintiff threatened to sue the defendant in order to expose what she alleged was his dishonesty. To avoid this exposure the defendant gave the plaintiff 11*l.* forthwith and said he would pay the balance of the 74*l.* by monthly instalments within a year. The plaintiff thereupon agreed not to sue him upon the dishonoured cheque for 74*l.* The defendant, however, failed to pay more than the 11*l.* and the plaintiff brought an action upon the dishonoured cheque, alternatively upon the promise by the defendant to pay the plaintiff the sum of 74*l.* in consideration of the plaintiff refraining from taking legal action against him in respect of the 74*l.* :—

Held, by the Court of Appeal, that the promise by the plaintiff to forbear from suing the defendant for payment of the gaming debt, with the consequent exposure which would accompany such an action, was not a good consideration which would support a promise by the defendant to pay such gaming debt.

Dictum of Tindal C.J. in *Wade* v. *Simeon* (1846) 2 C. B. 548, 564 applied.

Hyams v. *Coombes* (1912) 28 Times L. R. 413, and *Burrell and Son* v. *Leven* (1926) 42 Times L. R. 407, approved.

Hyams v. *Stuart King* [1908] 2 K. B. 696 considered.

APPEAL from a decision of His Honour Judge Dale sitting at the Birmingham County Court.

The plaintiff, Frida Poteliakhoff, a married woman, claimed to recover from the defendant, R. G. Teakle, the amount due on a dishonoured cheque dated October 3, 1936, alternatively the plaintiff said that on October 3, 1936, it was orally agreed between herself and the defendant that in consideration of the plaintiff refraining from taking legal action against the defendant in respect of the sum of 74*l.*, then agreed to be owing by the defendant to the plaintiff, the defendant would pay to the plaintiff the sum of 74*l.* She alleged that the defendant had subsequently paid her the sum of 11*l.* in cash and she claimed 63*l.* as being the balance due on the dishonoured cheque.

The plaintiff owned a club for the playing of card games and gambling. The defendant came to the club and played and lost. He, on October 3, 1936, gave to the plaintiff a cheque for 74*l.* in respect of that gambling debt. That cheque was dishonoured on presentation. After the cheque was dishonoured the plaintiff threatened to sue the defendant. The defendant was extremely concerned at the prospect of such an action, as it would disclose his position, and this would be most prejudicial to him, especially as he already had a considerable overdraft at his bank concerning which the bank manager had warned him against drawing any substantial cheques. He told the plaintiff of the anxiety he was in to prevent the fact of this gaming debt from becoming known. She threatened to bring the action in order to expose what she alleged was the dishonesty of the defendant. To avoid this the defendant said he would pay 11*l.* forthwith and the balance of the 74*l.* in monthly instalments within a year. The plaintiff thereupon agreed not to sue upon the cheque for 74*l.* The defendant, however, failed to pay more than the 11*l.*, and the plaintiff sued on the agreement to pay 74*l.*, giving credit for the 11*l.* which had been paid by the defendant.

The plaintiff, in giving evidence, said that the gambling club had been running for six years. Honest people did not plead the Gaming Act. She thought that the defendant would pay if she sued him on the cheque. Twice she had had cases similar where they had paid into Court. The defendant agreed to pay 11*l.* and the instalments because she agreed not to sue.

The county court judge held that so far as the action was founded on the dishonoured cheque it failed by reason of the Gaming Act, 1845, s. 18. But in his opinion there was sufficient consideration for the agreement sued upon to bring the case within *Hyams* v. *Stuart King.* (1) The consideration for the new agreement was the avoidance of the publicity that would have been caused by the action. The action which the plaintiff refrained from bringing was not one which necessarily must have failed. It would have been founded on a dishonoured cheque and, until the defendant relied on the Gaming Act, the action would have been properly brought. The plaintiff would not know how far the defendant intended to rely on the Gaming Act, and before such question was decided the harm to the defendant from the publicity of the action might well have been done. To avoid that, the agreement sued upon was entered into. In his opinion such agreement was not one by way of compromise of an action or threatened action which must have failed in any event, as considered in *Hyams* v. *Coombes* (2) and *Burrell & Son* v. *Leven.* (3) For these reasons judgment must be given for the plaintiff for 63*l.* with costs.

The defendant appealed.

Constantine Gallop for the appellant. The decision of the county court judge was wrong. He held there was sufficient consideration to bring the case within the decision in *Hyams* v. *Stuart King.* (1) There never was any consideration sufficient to bring the present case within the principles laid down in that case. There is a great difference between a case where the forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter at Tattersalls, was held to be a good consideration for a fresh promise to pay and a case where the plaintiff says that, unless the defendant promises to pay, he will bring an action which he knows will fail, but which will give publicity to the defendant's conduct. If a plaintiff has no belief in the validity of the action which he threatens to bring in order to recover a gambling debt, that cannot be a good consideration for a promise by the defendant to pay such a debt: *Hyams* v. *Coombes* (2); *Burrell & Son* v. *Leven.* (3) This was a

(1) [1908] 2 K. B. 696.
(2) 28 Times L. R. 413.
(3) (1926) 42 Times L. R. 407.

void contract and the plaintiff therefore had no cause of action. A promise to withdraw that which could not be a valid cause of action can not be a good consideration for a promise to pay the gaming debt. Tindal C.J. said in *Wade* v. *Simeon* (1): "It is almost contra bonos mores, and "certainly contrary to all the principles of natural justice, "that a man should institute proceedings against another, "when he is conscious that he has no good cause of action. "In order to constitute a binding promise, the plaintiff must "shew a good consideration, something beneficial to the "defendant, or detrimental to the plaintiff. Detrimental to the "plaintiff it cannot be, if he has no cause of action: and "beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state "of facts must be successful, and the defendant will recover "costs, which must be assumed to be a full compensation "for all the legal damage he may sustain. The consideration, "therefore, altogether fails." The plaintiff, according to her evidence, knew that an action to recover the gaming debt would not succeed, as the Gaming Act would be a good defence to any action she might bring. A promise not to sue is not a good consideration for a promise to pay a gaming debt when the plaintiff knows that she has no good cause of action. In *Hyams* v. *Stuart King* Sir Gorell Barnes P. said (2): "In the case of *Chapman* v. *Franklin* (3) the "defendant had offered to pay amounts which he had lost "in respect of bets on horse races, after the expiration of an "extended time, and the offer was accepted; but it was held "that there was no consideration for the promise to pay, "as there was no evidence of any forbearance at the debtor's "request to do anything to the detriment of the debtor, "and therefore the action would not lie, but it would seem "from the report that both Lord Alverstone C.J. and "Kennedy J. thought that an agreement to exercise forbearance not merely to sue, but to forbear doing something "else to the detriment of the debtor, would have amounted

---

(1) 2 C. B. 548, 564.

(2) [1908] 2 K. B. 696, 703.

(3) (1905) 21 Times L. R. 515.

"to good consideration." Later on the same page the President, referring to *Goodson* v. *Baker* (1), said: "I notice that, on "the evidence as reported, there was nothing to shew anything "more than an agreement not to sue for a time. There may "have been a fear on the part of the defendant that if he "did not pay he might be declared a defaulter; but I find "no evidence of any agreement between the parties that the "plaintiff would not declare the defendant a defaulter, "and unless there was such an agreement there would be "no consideration to support the alleged promise, and the "decision could not be supported." Farwell L.J. also said (2): "The alleged consideration for the special contract is there-"fore—(1.) giving time; (2.) refraining from publishing the "defendant's default. Now the first is in my opinion no "consideration at all; to give time for a payment that can "at no time be enforced is nothing at all." Here the promise not to sue was at most the giving of time. [He was stopped.]

Ashe Lincoln for the respondent. There was good consideration for the defendant's promise to pay, because there was no evidence before the Court that the plaintiff did not believe that she had a good cause of action against the defendant. According to the plaintiff's evidence she thought that she had a right to sue upon the cheque provided that the defendant did not plead the Gaming Act.

[GREER L.J. She relied upon the fact that honest people did not plead the Gaming Act.]

[SLESSER L.J. She knew that she had not a good cause of action if the Gaming Act was pleaded as a defence.]

In the present case there was something more than a mere forbearance to sue. In *Hyams* v. *Stuart King* (3) a threat to expose the defendant by having him posted as a defaulter followed by a forbearance to do so was held to be good consideration for the defendant's promise to pay a gaming debt. The threat to bring an action which would necessarily expose the conduct of the defendant, followed by a forbearance to do so, would be equally good consideration for the defendant's

(1) (1908) 98 L. T. 415.
(2) [1908] 2 K. B. 725.
(3) [1908] 2 K. B. 696.

promise to pay. In the present case the defendant was overdrawn at his bank to the extent of 160*l.*, and he had been warned by the bank manager that, if he drew upon his account still further, his credit would be withdrawn. Therefore the threat by the plaintiff to bring the action to recover the gaming debt, which would be detrimental to the defendant, together with his fear of exposure to the bank, would be good consideration for the defendant's promise to pay. If the plaintiff had threatened to write to the bank manager exposing the defendant, and had refrained from doing so on the defendant's promise to pay, that would have amounted to a good consideration within the decision in *Hyams* v. *Stuart King*. (1) There is a distinction between the present case and *Hyams* v. *Coombes* (2) and *Burrell & Son* v. *Leven* (3) inasmuch as in those cases the actions were not brought on a cheque. Kennedy J. in *Chapman* v. *Franklin* (4) said that where the compromise was not a forbearance to sue, but a forbearance to do something else to the detriment of the debtor, such a compromise would be a good consideration for a promise to pay. That applies to the present case.

GREER L.J. What our decision should be in this case is clear; it is beyond doubt that the learned county court judge made a mistake in law in allowing the plaintiff's claim. I agree entirely with what was said by Farwell L.J. in giving judgment in *Hyams* v. *Stuart King* (5), when he said: "The alleged consideration for the special contract is "therefore—(1.) giving time; (2.) refraining from publishing "the defendant's default. Now the first is in my opinion no "consideration at all; to give time for a payment that can "at no time be enforced is nothing at all. But the second "has been held by Darling J. to be sufficient." In the judgment of the President in *Hyams* v. *Stuart King* (1), I find that there is nothing inconsistent with the view expressed by Farwell L.J. There are several passages in that judgment which appear to be in agreement. In referring to the case of *Chapman* v. *Franklin* (1), the President said (2): "but it "would seem from the report that both Lord Alverstone C.J. "and Kennedy J. thought that an agreement to exercise "forbearance not merely to sue, but to forbear doing "something else to the detriment of the debtor, would "have amounted to good consideration." I look upon that passage as meaning that in the President's view it would not be sufficient to say there was an agreement to exercise forbearance to sue. Then lower down, referring to *Goodson* v. *Baker* (3), he says: "I notice that, on the evidence "as reported, there was nothing to shew anything more "than an agreement not to sue for a time. There may have "been a fear on the part of the defendant that if he did not pay "he might be declared a defaulter; but I find no evidence "of any agreement between the parties that the plaintiff "would not declare the defendant a defaulter, and unless "there was such an agreement there would be no consideration "to support the alleged promise, and the decision could not "be supported." It is not possible in this case to find a fresh consideration for the payment of a debt which could not successfully be sued upon. The plaintiff herself said at the trial: "Gambling club running six years. Honest people "don't plead Gaming Act. I thought he would pay if I sued "him on the cheque." She meant by that: "Although "the defendant was not liable in law to pay, I thought he "would pay rather than allow the action to go for trial." From that it seems to me quite clear that there is no evidence of any new consideration for the fresh promise to pay the gambling debt.

---

(1) [1908] 2 K. B. 696.
(2) 28 Times L. R. 413.
(3) 42 Times L. R. 407.
(4) 21 Times L. R. 515.
(5) [1908] 2 K. B. 696, 725.

I agree with the view expressed by the two Courts of first instance in *Hyams* v. *Coombes* (4) and *Burrell & Son* v. *Leven*. (5)

This appeal must be allowed with costs.

SLESSER L.J. I am of the same opinion.

(1) 21 Times L. R. 515.
(2) [1908] 2 K. B. 703.
(3) 98 L. T. 415.
(4) 28 Times L. R. 413.
(5) 42 Times L. R. 407.

C. A.
1938

POTELIAKHOFF
v.
TEAKLE.

Slesser L.J.

The learned county court judge states in his judgment that the cheque was given by the defendant to the plaintiff in respect of a gambling debt, and it is quite clear, I think, from the evidence of the plaintiff that she knew that the Gaming Act, if it had been pleaded, would have been an answer to her claim, for she states: "Honest people don't "plead Gaming Act." The learned judge goes on to say that she threatened to bring the action to expose what she alleged was the dishonesty of the defendant—not to recover her money, but to expose him. To avoid this the defendant said he would pay 74*l.*; 11*l.* forthwith and the balance in monthly instalments within a year. On that the learned judge has come to the conclusion that the defendant agreed to pay this 74*l.* in instalments in order to avoid publicity, and has, I think, misdirected himself in thinking, therefore, that the case fell within the principle of the decision in *Hyams* v. *Stuart King* (1) where the avoidance of publicity was taken to be a good consideration. But the class of case with which *Hyams* v. *Stuart King* (1) is dealing is not the case where there is an agreement for forbearance to sue on a void contract and the further consideration that if there is a suit, there may be an exposure of the defendant in the Court as a consequence of the suit and the pleading of the Gaming Act. It is a case dealing with publicity which will be given otherwise than by an action—namely, by posting at Tattersalls and the like.

To my mind the learned judges in *Hyams* v. *Stuart King* (1) make that distinction very clear. The President, after reviewing the case of *Goodson* v. *Baker* (2) which, he points out, is insufficiently reported, says (3): "I find no evidence "of any agreement between the parties that the plaintiff "would not declare the defendant a defaulter, and unless "there was such an agreement there would be no consideration "to support the alleged promise, and the decision could not "be supported." In other words, he is pointing out that in the case of *Goodson* v. *Baker* (2) the real basis of that decision

(1) [1908] 2 K. B. 696.
(2) 98 L. T. 415.
(3) [1908] 2 K. B. 704.

C. A.
1938

POTELIAKHOFF
v.
TEAKLE.

Slesser L.J.

was in relation to publicity threatened altogether outside the question of a mere forbearance to sue.

My Lord has pointed out the passage (1) where Farwell L.J. deals with the various considerations as to giving time and refraining from publishing the defendant's default, that is, giving time before action brought, and he goes on to say, " Now the first is in my opinion no consideration at all ; to "give time for a payment that can at no time be enforced "is nothing at all." Those words are entirely consistent with the case of *Wade* v. *Simeon* (2), where Tindal C.J. says this (3) : "By demurring to that plea, the plaintiff admits that he "had no cause of action against the defendant in the action "therein mentioned, and that he knew it. It appears to me, "therefore, that he is estopped from saying that there was "any valid consideration for the defendant's promise. It is "almost contra bonos mores, and certainly contrary to all "the principles of natural justice, that a man should institute "proceedings against another, when he is conscious that he "has no good cause of action. In order to constitute a binding "promise, the plaintiff must shew a good consideration, "something beneficial to the defendant, or detrimental to "the plaintiff. Detrimental to the plaintiff it cannot be, if "he has no cause of action : and beneficial to the defendant "it cannot be ; for, in contemplation of law, the defence "upon such an admitted state of facts must be successful, "and the defendant will recover costs, which must be assumed "to be a full compensation for all the legal damage he may "sustain." That passage, which is not only supported in the case to which I have referred, but in all the other cases which proceed on the same principle, seems to me to establish beyond question that a mere forbearance to sue at the debtor's request is no sufficient consideration in a Gaming Act case to support a new promise.

MacKinnon L.J. I agree. *Hyams* v. *Stuart King* (4) is simply a decision that on the facts of that case the defendant

(1) [1908] 2 K. B. 725.
(2) 2 C. B. 548.
(3) 2 C. B. 564.
(4) [1908] 2 K. B. 696.

promised upon a good consideration to pay a certain sum of money. In this case the defendant promised to pay a certain sum of money, but the plaintiff cannot allege that there was any good consideration for that promise. The only consideration she can suggest is some undertaking by her to abstain from suing him upon a void cause of action. The principle in *Hyams* v. *Stuart King* (1) is not one which it is desirable to extend, and I am quite clear this case does not fall within that principle.

Appeal allowed.

Solicitors for appellant (defendant): *Rising & Ravenscroft, for H. E. Wynschenk & Needham, Birmingham.*

Solicitors for respondent (plaintiff): *Lincoln & Lincoln.*

---

(1) [1908] 2 K. B. 696.

R. F. S.

1938
June 15.

ATTORNEY-GENERAL *v.* CANTER.

Revenue—Income Tax—Liability for penalty—Death of person liable—Survival of cause of action against estate of deceased—Claim for penalty not an action in tort—Debt created by statute—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 30, *sub-s.* 1—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1.

By s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934: "Subject to the provisions of this section, on the "death of any person after the commencement of this Act all "causes of action subsisting against or vested in him shall survive "against, or, as the case may be, for the benefit of, his estate. ". . . ."

By s. 30, sub-s. 1, of the Income Tax Act, 1918: "A person "who in making a claim for or obtaining any exemption, abatement, or relief . . . . (*a*) is guilty of any fraud or contrivance; "or (*b*) fraudulently conceals or untruly declares any income or "any sum which he has charged against or deducted from, or "was entitled to charge against or to deduct from another person; "or (*c*) fraudulently makes a second claim for the same cause," incurs a penalty :—

Held, that on the death of a person liable to pay the penalty under the sub-section, a cause of action to recover the penalty survives against the estate of the deceased person, by virtue of s. 1, sub-s. 1, of the Act of 1934.

By sub-s. 3 of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934: "No proceedings shall be maintainable in respect of "a cause of action in tort which by virtue of this section has "survived against the estate of a deceased person, unless either "(*a*) proceedings against him in respect of that cause of action "were pending at the date of his death; or (*b*) the cause of action "arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months "after his personal representative took out representation."

Held, that the claim for the penalty was not an action in tort but was a claim for a debt created by statute, and therefore sub-s. 3 of s. 1 of the Act of 1934 did not apply.

CASE stated under Order XXXIV. of the Rules of the Supreme Court, to obtain the opinion of the Court on questions arising under s. 30 of the Income Tax Act, 1918, and s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934. (1)

An information was brought in the name of the Attorney-

---

(1) Income Tax Act, 1918, s. 30, sub-s. 1: "A person who in "making a claim for or obtaining "any exemption, abatement, or "relief . . . . (*a*) is guilty of any "fraud or contrivance; or (*b*)

1938

ATTORNEY-GENERAL
v.
CANTER.

General, under s. 221 of the Income Tax Act, 1918, against Mrs. Clara Agnes Canter as executrix of the will of a person who died on July 31, 1934, to recover the sum of 2843*l.* 13*s.* 9*d.* forfeited to His Majesty.

The testator in making claims for allowances and deductions for the years ending April 5, 1932, and April 5, 1933, forfeited and became liable to pay under s. 30, sub-s. 1 (*b*), of the Income Tax Act, 1918, sums of 1652*l.* 7*s.* 6*d.* and 1191*l.* 6*s.* 3*d.* The liability to pay each of those sums was subsisting at the date of the testator's death.

After the death of the testator and in the course of the investigation of his estate for the purpose of death duties knowledge of the liability to penalties came to the Commissioners of Inland Revenue, and the present proceedings were by their order begun on July 26, 1937, by writ of subpœna against the defendant as his executrix to recover the sums forfeited by the testator. No proceedings to recover either sum were pending at the date of the testator's death, and the liability in each case arose earlier than six months before his death.

The questions for the opinion of the Court were: (1.) Whether the liability to pay the sums referred to gave rise

---

"fraudulently conceals or untruly "declares any income or any sum "which he has charged against or "deducted from, or was entitled "to charge against or to deduct from "another person; or (*c*) fraudu-"lently makes a second claim for "the same cause, shall forfeit the "sum of 20*l.* and treble the tax "chargeable in respect of all the "sources of his income and as if "such claim had not been "allowed."

Law Reform (Miscellaneous Provisions) Act, 1934, s. 1:— "(1.) Subject to the provisions "of this section, on the death of "any person after the commence-"ment of this Act all causes of "action subsisting against or "vested in him shall survive "against, or, as the case may be, "for the benefit of, his estate. ". . . .

"(3.) No proceedings shall be "maintainable in respect of a "cause of action in tort which by "virtue of this section has sur-"vived against the estate of a "deceased person, unless either— "(*a*) proceedings against him in "respect of that cause of action "were pending at the date of his "death; or (*b*) the cause of action "arose not earlier than six months "before his death and proceedings "are taken in respect thereof not "later than six months after his "personal representative took out "representation."

to such a cause or causes of action as were by s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, made to survive as against the estate of the testator. (2.) Whether those proceedings were in respect of a cause of action in tort within the meaning of s. 1, sub-s. 3, of that Act.

It was agreed that if the opinion of the Court were in the affirmative on the first question, and in the negative on the second question, judgment should be entered against the defendant for the sums forfeited; but if the opinion of the Court were either in the negative on the first question or in the affirmative on the second question, judgment should be entered for the defendant on the claim. It was further agreed that the defendant should be entitled to costs as between solicitor and client in any event.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. Sect. 221 of the Income Tax Act, 1918, provides that any fine or penalty may be sued for and recovered with full costs of suit, and "shall be sued for by information." For the nature of an information see Robertson's Civil Proceedings by and against the Crown, 1908 ed., p. 170. It is stated in Manning's Exchequer Practice, 2nd ed., p. 201, that the species of information of most frequent occurrence was an information of debt, which in certain cases was to be considered as the King's action of debt.

The provision of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, with regard to the survival of causes of action is quite general. Before that Act, the view seemed to prevail that actions for penalties did not survive. Actions in contract survived. Actions in tort, subject to one or two exceptions, did not survive. The Administration of Estates Act, 1925, by s. 26 gives a right of action to personal representatives in respect of injuries to the personal estate. The generality of the provisions of s. 1 of the Act of 1934 suggests that it must have been intended to cover actions other than actions in contract—which survived already—or ordinary actions in tort, and such other actions may include actions for penalties. In Bullen and Leake's Precedents (3rd ed.) actions for penalties are dealt with under the heading "Actions for contract," and not actions for tort.

It is conceded in this case that no proceedings were pending in respect of these penalties at the date of the death of the testator and that the cause or causes of action arose earlier than six months before his death. But it is submitted that an action for penalties under the Income Tax Act, 1918, is not an action in tort within the meaning of sub-s. 3 of s. 1 of the Act of 1934, which provides that no proceedings shall be maintainable in respect of a cause of action in tort which by virtue of that section has survived against the estate of a deceased person unless certain conditions therein stated have been fulfilled. In Salmond on Torts, 9th ed., p. 9, para. 2, it is said that the essential characteristic of an action for tort is that it is an action for unliquidated damages.

The question under the Act is not whether an action for penalties has the characteristics of an action in tort, but whether it is an action in tort. In *David* v. *Britannic Merthyr Coal Co.* (1) Fletcher Moulton L.J. distinguished an action for penalties from an action in tort. The civil liability for breach of a statutory duty gives no cause of action unless damage follows from it, and then it, in general, gives ground for an action for the damage at the suit of the person injured. But penalties for breaches of statutory duties apply whether damage has been caused or not. Their object is to punish the act and prevent its commission. *Attorney-General* v. *Burges* (2) was an information of devenerunt in a case where goods had been landed without paying customs duties. It was an information in rem to recover the goods and to recover the penalty imposed by the Statute of 8 Anne, cap. 7, s. 17. It was held that the penalties could be recovered from any one of the persons concerned in landing the goods, because the cause of action was in the nature of a tort, and that the principle of actions of tort with regard to joinder of persons applied to actions for penalties of that type. In *Story* v.

(1) [1909] 2 K. B. 146, 160. (2) (1726) Bunb. 223.

Sheard (1) the statute provided for the recovery of damages on the same basis as in actions of tort. It was there held that extraordinary traffic expenses could not be recovered after the death of the person causing the excessive traffic from his executor, because they were in the nature of tort. That case is distinguishable from the present, because it was not an action for penalties, but was for such expenses as might be proved to have been caused. It was a cause of action in the nature of tort. The cause of action in the present case is for a statutory debt, a debt created by the Income Tax Act, 1918, s. 30. It is not an action for unliquidated damages, which is the essential characteristic of actions in tort, but it is for a liquidated sum settled by the statute itself.

Raymond Needham K.C. and *Terence Donovan* for the defendant. This is not a cause of action within the meaning of the Law Reform (Miscellaneous Provisions) Act, 1934. A claim for a penalty does not fall within the words of s. 1 of the Act of 1934. The fundamental question to be decided here is, what is the true nature of an income tax penalty, and the decision of that question is not assisted by reference to the old authorities but by a consideration of the provisions of the Income Tax Act, 1918. The Act of 1934 ought not to be read as applying to taxation matters or to penalties imposed by a taxing Act. The object of the Act of 1934 is to destroy, so far as it goes, the effect of the maxim "actio "personalis moritur cum persona." The Act of 1934 contains no reference to penalties, but there are many references to damages. There is no reference to the Income Tax Act, 1918, in it, and there are some inconsistencies between the provisions of the two Acts. Sect. 3 of the Act of 1934 gives the Court power to award interest on any debt or damages. That provision harmonizes with the class of case where interest is added to the damages. It is not appropriate to a cause of action for penalties, since the Income Tax Act, 1918, contains no provision for interest on penalties. The Act of 1934 was passed on July 25, 1934. The Finance Act, 1934, was passed a few days earlier, and there is no cross-reference in the two

---

(1) [1892] 2 Q. B. 515.

Acts. Moreover s. 4 of the Act of 1934 provides that the Act of 1934 shall not extend to Scotland or Northern Ireland. If the Attorney-General is right, the extraordinary result would follow that if a taxpayer died in England his estate would be liable for penalties, whereas if he died in Scotland or Northern Ireland his estate would not be liable. It is therefore submitted that the words of s. 1 of the Act of 1934 ought to be read as excluding causes of action for penalties under the Income Tax Act, 1918.

Further, the action for penalties is, in its nature, an action of tort. The whole basis of a penalty is the punishment for deceit, which is the matter in respect of which the penalty is imposed under s. 30 of the Income Tax Act, 1918. The matter should be approached by a consideration of the wrong in respect of which the penalty is imposed and not by considering the nature of the remedy. It is submitted that the answer to the first question ought to be in the negative, and to the second in the affirmative.

Sir Donald Somervell A.-G. replied.

LAWRENCE J. The questions which are raised on this information are (1.) whether the liability to pay these penalties gives rise to such a cause or causes of action as are by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1, made to survive against the estate of the testator, and (2.) whether these proceedings are in respect of a cause of action in tort within the meaning of s. 1, sub-s. 3, of that Act.

It is conceded that proceedings were not pending at the date of the death of the testator, and the cause of action arose earlier than six months before his death, and proceedings were not taken until six months after, or, at any rate, if this is a cause of action in tort, it is conceded that the Crown cannot recover the sum claimed. The Attorney-General argued that an action for penalties under the Income Tax Act, 1918, is not an action in tort within the meaning of s. 1, sub-s. 3, of the Act of 1934, and in support of that argument he relied on the authority of

Robertson's Civil Proceedings against the Crown, 1908 ed., p. 170, dealing with informations, where it is said that the information is the King's action of debt, and that therefore this information for these penalties is a cause of action for debt, and not in tort. Secondly, he relied on Bullen and Leake's Precedents (3rd ed.), where actions for penalties are dealt with under the heading of " Actions for contract," and not actions for tort. Thirdly, he relied on the definition of tort in Salmond on Torts, 9th ed., pp. 8, 9, para. 2, where it is said that the essential characteristic of an action in tort is that it is an action for damages. Fourthly, he referred to *David* v. *Britannic Merthyr Coal Co.* (1), where Fletcher Moulton L.J. distinguishes an action for penalties from an action in tort, and where he says (2): " The civil liability arising from the breach "of a statutory duty is of a wholly different nature "from a penalty for such breach. The former gives no cause "of action unless damage to a third party follows from it, "and then it, in general, gives ground for an action for the "amount of such damage at the suit of such third party. "But penalties for breaches of statutory duties apply whether "damage has been caused or not. Their very object is to "punish the act itself and thus prevent its commission, "whether damage follows or not. . . . ."

The Attorney-General further distinguished *Attorney-General* v. *Burges* (3), which was an information of devenerunt in a case in which goods had been landed without paying customs duties, and the information was apparently to recover the goods and to claim the penalty imposed by the Statute of 8 Anne. The Court held that the penalties could be recovered from any one of the persons concerned in landing the goods, because the cause of action was in the nature of a tort. He distinguished that case partly from the nature of the information of devenerunt, which is always spoken of as being of the nature of conversion, and was an information apparently claiming the goods themselves, and was therefore an information in rem, and secondly, on the ground of the decision there, not that it was a cause of action in tort, but that it was a cause of action in the nature of a tort. He also referred to *Story* v. *Sheard* (1), where it was held that extraordinary traffic expenses, which could be recovered under the statute in that regard, could not be recovered, after the death of the person who caused the excessive traffic, from his executor, because they were in the nature of tort. He argued that that case was also distinguishable, partly because it was not an action for penalties, but was for such expenses as might be proved, and was therefore in that regard analogous to tort, and also because the observation of the Court thereupon was that it was not a cause of action in tort, but a cause of action in the nature of tort. He summed up his argument by saying that the cause of action and the form of the action in this case is an action for a statutory debt, a debt created by the Income Tax Act, 1918, and a form of action which is an action for debt, and it was not for an unliquidated sum, which is the essential characteristic of actions in tort, but was for a liquidated sum settled by the statute itself; that it was not analogous to a tort, in that it was not an action for the protection of a right of each member of the public, but was an action given to the Crown by the statute; and, lastly, that it was a statutory remedy, and not, as in the case of what are strictly called torts, arising at common law. For these reasons, he submitted that the cause of action in this case is not a cause of action in tort, and that the answer to the second question which is put to me ought to be in the negative.

---

(1) [1909] 2 K. B. 146; in H. L. sub nom. *Britannic Merthyr Coal Co., Ld.* v. *David* [1910] A. C. 74.

(2) [1909] 2 K. B. 160.

(3) Bunb. 223.

To this argument Mr. Needham replied by saying that the main burden of his argument was to be, not that this was a cause of action in tort—although he did contend that—but that it was not a cause of action within the meaning of the Law Reform (Miscellaneous Provisions) Act, 1934, at all, and did not fall within the words of s. 1 of the Act of 1934. He contended that the Act of 1934 in its general terms ought not to be read as applying to taxation matters or to penalties

(1) [1892] 2 Q. B. 515.

imposed under a taxing Act, and in particular that s. 3, which gives the Court power to award interest upon any debt, or damages, was a provision which was inappropriate to a cause of action for penalties. Lastly, he said that the provisions of s. 4, sub-s. 2, of the Act of 1934—that the Act should not extend to Scotland or Northern Ireland—would produce such an extraordinary position that the words of s. 1 ought to be read in some limited sense, so as to exclude causes of action for penalties under the Income Tax Act, 1918. He also contended that the action for penalties under that Act is, in its nature, an action in tort, because of what should be considered as the basis of the penalty—namely, the punishment for deceit, which is the subject-matter in respect of which the penalty is imposed, under s. 30 of the Act of 1918.

The Attorney-General, in reply, contended that the position said to have been created by s. 4, sub-s. 2, of the Act of 1934, and which very likely was the position created by that section, was not an anomalous situation, and was a situation which, almost inevitably, the Act of 1934 must create. For instance, he pointed out that the liability of executors always had been different in England and Scotland, the maxim "actio personalis "moritur cum persona" not applying in the same sense in Scotland as it did before the Act of 1934 in England, and that, secondly, as another instance, whereas the law of tort in Northern Ireland had been before the Act of 1934 the same as that in England, it is obvious that, unless the Legislature of Northern Ireland has legislated in the same sense as the Act of 1934, it must now be different.

Although I was at first disposed to agree with the argument presented by Mr. Needham on s. 4 of the Act of 1934, I have come to the conclusion that the words of s. 1 cannot be limited by reason of s. 4 of the Act of 1934, and that there is no ground for limiting those general words for any other reason such as those suggested by Mr. Needham.

In my judgment, the words of s. 1 are perfectly general, and include every cause of action subsisting against the person at the time of his death, and surviving against, or for the benefit of, his estate. I am further of opinion that an information for penalties under the Income Tax Act, 1918, is not a cause of action in tort within the meaning of s. 1, sub-s. 3, of the Act of 1934. Although the action is for penalties for a breach of s. 30, and is based on deceit, it is not, in my opinion, an action in tort. It is an action for a debt created by the statute, and is not a cause of action in tort within the meaning of s. 1, sub-s. 3. Judgment will be entered for the informant for the sum claimed, and for the defendant, in accordance with the agreement between the parties, for costs as between solicitor and client.

Judgment accordingly.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for the defendant: *Burr, Sugden & Co.*

T. W. M.

1938
June 14;
July 8.

LAYCOCK (INSPECTOR OF TAXES) *v.* FREEMAN HARDY AND WILLIS, LIMITED.

Revenue—Income tax—Sch. D—Retail company—Wholesale subsidiary companies — Absorption by holding company — Succession to business—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 11, *sub-r.* 2—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32.

The respondents, whose headquarters were at Leicester, carried on a large retail boot and shoe business with numerous branches. Before April, 1935, they did not manufacture their goods themselves, but bought from wholesale manufacturers—including two subsidiary companies whose works were at Kettering and Leicester. They owned the whole of the capital in these two companies, directly or through nominees, and took their whole output. In March, 1935, the two companies went into voluntary liquidation and the whole of their businesses and premises were assigned to the respondents. After the assignment, separate accounts were kept for the factories of the two companies as departments of the respondents, and all boots and shoes made by them were sold direct to the public in the respondents' shops. The Crown contended that the respondents "succeeded" on April 1, 1935, to the trade previously carried on by the two companies within r. 11, sub-r. 2, of rules applicable to Cases I. and II. of Sch. D as amended by the Finance Act, 1926, and that the assessment of the respondents for the years 1935–36 should be based on the profits of the respondents for the year ended December 31, 1934, together with the profits for the year ended March 31, 1936, from the factories of the two companies:—

Held, that the businesses of the two companies ceased on April 1, 1935, and that therefore the respondents did not "succeed" to those businesses within r. 11, sub-r. 2.

Bell v. *National Provincial Bank of England* [1904] 1 K. B. 149 distinguished.

Held also, that the question was one of principle and not of fact only.

CASE stated by Special Commissioners under the Income Tax Act, 1918, s. 149.

At a meeting of the Special Commissioners held on December 18, 1936, the respondents appealed against an assessment to income tax under Case I. of Sch. D for the year 1935–36 in the estimated sum of 215,000*l.* The sole question was whether or no the respondents succeeded on April 1, 1935, to the businesses of two companies, Freeman Hardy and Willis (Kettering), Ld. and Freeman

Hardy and Willis (Burlington Works), Ld. (hereinafter called the two companies).

1938

LAYCOCK
v.
FREEMAN
HARDY &
WILLIS, LD.

The following statement of facts and contentions is taken from the Case stated :—

The respondents, whose headquarters were in Leicester, at all relevant times carried on a large retail business in about 570 shops situated in all parts of the country, the main part of the business consisting in the sale of leather shoes. Prior to April 1, 1935, the position was as follows :—

The respondents did not manufacture boots and shoes in completed form, but manufactured a few articles amounting in value to about 3 per cent. of the goods which they sold. They bought boots and shoes wholesale from other concerns, including about 20 per cent. to 30 per cent. from the Kettering company and the Burlington company taken together. These two companies, whose works were in Kettering and Leicester respectively, were manufacturing wholesale concerns which sold the whole of their finished products to the respondents. The respondents, who had an issued capital of 1,462,500*l.* and working capital of about 2,000,000*l.*, owned in their own name and in the name of nominees all the shares in the two companies, which had issued capital of 50,000*l.* and 150,200*l.* respectively. On March 21, 1935, resolutions were passed for the voluntary liquidation of the two companies. On March 27, 1935, the respondents issued a circular letter to those concerns from which the two companies had obtained their materials, in the following terms :—

"Dear Sirs,

"We beg to inform you that as from April 1 next we shall "take over the Shoe Manufacturing businesses at present "carried on in Kettering and Leicester respectively by our "subsidiary companies Freeman Hardy and Willis (Kettering), "Ld. and Freeman Hardy and Willis (Burlington Works), Ld., "which companies have gone into voluntary liquidation. The "directors of this company have decided to bring the activities "of the two subsidiaries under the direct control of the parent "company, with a view to obtaining closer co-operation and a "more unified management. There will be no change in the "management, or personnel of the two factories, but all letters "invoices and communications intended for the partners should "on and after April 1 next be addressed to Freeman Hardy "and Willis, Ld., 4, Mill Road, Kettering, or Freeman Hardy "and Willis, Ld., Burlington Works, Humberstone Road, "Leicester, as the case may be.

"Yours faithfully,
"p.p. FREEMAN HARDY & WILLIS, LD.,
"A. E. HARDY,
"Secretary."

On April 1, 1935, the Burlington company, acting by its liquidator, conveyed and assigned to the respondents its freehold land, fixtures, etc., and the goodwill of its business. On the same date the Kettering company, acting by its liquidator, assigned to the respondents the benefit of the tenancy of its factory and premises (to merge in the respondents' freehold) and the goodwill of its business.

Mr. A. E. Hardy, a director and secretary of the respondents, gave evidence as follows :—

Before April 1, 1935, when the assets of the two companies passed to the respondents, the respondents fixed the price at which boots and shoes manufactured by the two companies were sold to them. The whole of the profits of those companies was distributed in dividends to the respondent company.

From and after April 1, 1935, separate accounts, made up on the same lines as when the companies were in existence, were kept for the factories of the two companies as departments of the respondents, who sold at retail the whole of the finished products of these factories. The method of accounting, which showed in each case the cost of purchases made for the factory, and a figure for sale arrived at by the addition of an arbitrary percentage for profit, was the same as that which had been followed before April 1, 1935, in relation to the small amount of manufacture then done by the respondents. The actual percentage of profit added on arriving at the sales figures in the accounts of the Burlington Works factory and the Kettering factory was the same, or substantially the same, as that which had previously been fixed by the respondents for the two companies. The whole of the intangible and tangible assets and the staff of the two companies were taken over by the respondents. There was no change in the personnel. Substantially the same purchases continued to be made as had been made by the two companies. The respondents continued to manufacture in the same factories as the two companies had done and with the same machines. The respondents assumed the liability of the two companies for the hire of boot and shoe machinery used in the factories.

It was contended, on behalf of the respondents, that the businesses of the two companies ceased to exist on April 1, 1935; that the respondents did not succeed to either of the aforesaid businesses; that the business of the respondents after or before April 1, 1935, was a single business and that no profits were made by or could be attributed to the factories, which were an integral part of that business: that the assessment for 1935-36 should be based solely on the profits of the respondents for the year ended December 31, 1934.

It was contended on behalf of the Crown (inter alia) that the respondents succeeded on April 1, 1935, to the trade previously carried on by the two companies within the meaning of r. 11, sub-r. 2, of the rules applicable to Cases I. and II. of Sch. D (as amended); that the assessment for 1935–36 should be based on the profits of the respondents for the year ended December 31, 1934, together with the profits for the year ended March 31, 1936, of the respondents from the Kettering and Burlington Works factories.

The Special Commissioners held that the businesses of the two companies ceased on April 1, 1935, and that the respondents did not succeed to those businesses within the meaning of r. 11, sub-r. 2, of the rules applicable to Cases I. and II. of Sch. D (as amended). They were further of opinion that in the year 1935–36 the respondents made one profit only, and that the profit could not for income tax purposes be divided into a manufacturing profit and a retail profit.

They accordingly reduced the assessment to 214,171*l.* less 17,717*l.* wear and tear allowance.

This case was stated by the Commissioners at the request of the Crown for the opinion of the High Court.

Sir D. Somervell A.-G. and *Reginald Hills* for the Crown. The facts here show that there was a "succession" by the respondents to the business of these two companies within r. 11 of rules applicable to Cases I. and II. of Sch. D, as amended by the Finance Act, 1926, s. 32 (1): *Bell* v. *National Provincial Bank of England.* (2) This is indeed a stronger case than *Bell's* case (2), because the amalgamation here may be regarded as an extension of the respondent's business and not as the taking over of a different business. The respondents continued to carry on the business of manufacturing boots and shoes previously carried on by the two companies, the only difference being that instead of their purchasing the entire output of the two companies, the manufacture became part of the respondents' business, the boots and shoes being sold through their retail shops as before. The debts of the two companies were taken over as well as the assets. The business was carried on at the same place and with the same machinery. The word "succeed" in r. 11 implies continuity and the business was still carried on, even if the profits were merged. [They referred also to *Shipstone & Sons* v. *Morris.* (3)] The Commissioners were wrong in holding that the business of the two companies ceased on April 1, 1935, and that the respondents did not succeed thereto.

A. M. Latter K.C. and *John Senter* for the respondents. This is purely a question as to the method of working the Income Tax Acts. According to r. 11, as amended by the

---

(1) Rule 11, sub-r. 2, of rules applicable to Cases I. and II. of Sch. D, as amended by the Finance Act, 1926, s. 32, is as follows: "If . . . . any person "succeeds to any trade, profession "or vocation which until that "time was carried on by another "person and the case is not one "to which paragraph (1.) of this "Rule applies, the tax payable for "all years of assessment by the "person succeeding as aforesaid "shall be computed as if he had "set up or commenced the trade, "profession or vocation at that "time, and the tax payable for all "years of assessment by the person "who until that time carried on "the trade, profession or vocation "shall be computed as if it had "then been discontinued."

(2) [1904] 1 K. B. 149.

(3) (1929) 14 Tax Cas. 413.

Finance Act, 1926, s. 32, one must discover whether a separate trade has been commenced when the change is made. If it has, then for the year in question the assessment must be on the basis of the separate trade being carried on. Two points are to be observed here. First, the wholesale manufacturing business of these two companies ceased and with this their profits also came to an end. This distinguishes the present case from *Bell's* case (1) in which the banking business acquired by the company was continued. Secondly, a "succession" implies the capture of the profits of another trader. There was no such capture here, and the trading front of the respondents was not extended, but economies were effected in administration, while the trade continued exactly as before. Nor was there any assignment of goodwill, which did not exist in the legal sense: *Trego* v. *Hunt.* (2) There was here only one customer, namely, the respondents. As Palles C.B. said in *Dublin Corporation* v. *M'Adam* (3): "No man, in my opinion, "can trade with himself; he cannot, in my opinion, make, "in what is its true sense or meaning, 'taxable profit' by "dealing with himself; and in every case of this description "it appears to be a question on the construction of the "Act whether the two bodies—the body that supplies and "the body or class that has to pay—were either identical, "or, upon the true construction of the Act, must be admitted "to have been held by the Legislature to be identical, "and so legislated for upon that basis." Similarly in *Watson Bros.* v. *Lothian* (4) upon the sale of a tramp steamship without books, accounts, or lists of customers, it was held by the Scottish Court of Exchequer that there was no succession and that the owners were not entitled to be so assessed in the business of the previous owners, on the average profits made by them; and the judgment of the Lord President is on the same ground. Finally, this question is one of fact which has been decided by the Commissioners in our favour and that finding will not be disturbed by this Court: *Malayalam Plantations, Ld.* v. *Clark.* (5)

(1) [1904] 1 K. B. 149.
(2) [1896] A. C. 7.
(3) (1887) 2 Tax Cas. 387, 397.
(4) (1902) 4 Tax Cas. 441, 444.
(5) (1935) 19 Tax Cas. 314.

Sir Donald Somervell A.-G. in reply. The question is not one of fact alone, but of mixed fact and law, as in *Bell* v. *National Provincial Bank of England.* (1)

Cur. adv. vult.

1938. July 8. LAWRENCE J. read the following judgment. In this case the Special Commissioners have decided that the respondents did not succeed on April 1, 1935, to the businesses of Freeman Hardy & Willis (Kettering), Ld. and Freeman Hardy & Willis (Burlington Works), Ld. within the meaning of r. 11, sub-r. 2, of the rules applicable to Cases I. and II. of Sch. D. Before April 1, 1935, the Kettering company and the Burlington company were wholly owned subsidiary companies of the respondents and carried on the trade or business of manufacturing and selling boots and shoes to the respondents, who retailed such boots and shoes in their retail shops. The respondents obtained 20 per cent. to 30 per cent. of its requirements from these two companies, which sold to the respondents the whole of their products. On April 1, 1935, the respondents acquired the businesses of these two companies, which were wound up, and thereafter the respondents carried on the manufacture of boots and shoes in the works which had belonged to the two companies as departments of the respondents' business. In their accounts the respondents credited the departments with profit on the manufacture, but this profit was ignored for the purposes of income tax.

The Commissioners have held, and Mr. Latter for the respondents contends, that the businesses of the Burlington and Kettering companies ceased on April 1, 1935, and that therefore the respondents did not succeed to such businesses. Mr. Latter argues that a trade or business consists in buying or manufacturing and selling, that no one can sell to himself, and that there is no succession unless the trade succeeded to continues as a trade, and he relied upon the observations of Palles C.B. in *Dublin Corporation* v. *M'Adam* (2) and of the Lord President in *Watson Bros.* v. *Lothian.* (3)

(1) [1904] 1 K. B. 149.
(2) 2 Tax Cas. 387, 397.
(3) 4 Tax Cas. 441, 444.

The Attorney-General, on the other hand, contends that the manufacture has continued since April 1, 1935, in precisely the same way as before, and that the case of *Bell* v. *National Provincial Bank of England* (1) is decisive of the present question, the respondents not having put an end to the manufacture.

The question appears to me to be one of some nicety. In my opinion the decision in *Bell's* case (1) is not decisive, since there the business acquired was of the same nature, namely, banking, as the successor's business, whereas the business here acquired was wholesale and the alleged successor's business was retail. As Mr. Latter put it, there the successor extended his trading front by acquiring a new branch bank, which continued to trade as a bank with the public, whereas in the present case the trade of manufacturing and selling carried on by the Burlington and Kettering companies ceased, the manufacture only, but not the sale to the retailer, continuing.

The Attorney-General, on the other hand, argues that succession does not connote carrying on the trade in precisely the same way as the predecessor and that the merger of a wholesale trade in a retail does not put an end to the wholesale trade so as to prevent the occurrence of a succession. Mr. Latter also argued that it was a question of fact, and cited the *Malayalam Plantations Ld.* v. *Clark*. (2) The Commissioners did not, however, express their decision as a question of fact, and in my opinion it is really a question of principle upon which I ought to express my own opinion. Questions of fact might arise as to whether the trade carried on by the successor was the same trade as that of the predecessor, but the decision in the present case was not, in my view, upon such questions, but upon the question which I regard as one of principle, whether the trade must be continued as a trade, or whether there may be a succession when the trade carried on by the predecessor is merged in the different trade of the successor.

I have come to the conclusion that the view of the Commissioners is right. The words of the rule, "if any person "succeeds to any trade," in my opinion mean if any person

---

(1) [1904] 1 K. B. 149.

(2) 19 Tax Cas. 314.

1938

LAYCOCK
v.
FREEMAN
HARDY &
WILLIS, LD.

Lawrence J.

takes over and continues a trade as that trade, and do not include the incorporation of a wholesale trade in a retail. The fact that the wholesale trade before the alleged succession was carried on entirely with a parent company by subsidiaries is, in my view, irrelevant. The three companies were distinct legal personæ. The trade of the two subsidiaries in my opinion ceased on April 1, 1935, as the Commissioners held.

Appeal dismissed.

Solicitors for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Kingsford, Dorman & Co., for Harvey, Clarke & Adams, Leicester.*

F. P. F.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1938.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1938, will be as follows :—

In the First Series,
[1938] Ch.

In the Second Series,
[1938] 1 K. B.   [1938] 2 K. B.   [1938] P.

In the Third Series,
[1938] A. C.

INDEX.

ABANDONMENT—Of damaged vessel to hull underwriters — Absence of — Claim against freight underwriters for constructive total loss—Whether maintainable - - - **603**
See Insurance (Marine).

ACCIDENT.
See Personal Injury, Road Traffic, and Workmen's Compensation.

ACCOUNT.
See Joint Account.

ACTION—Against owner of mental institution—Order giving leave to bring—Appeal from—Whether to Court of Appeal or Divisional Court - **637**
See Appeal.

—— Of tort—Commencement in High Court —Application by defendant for transfer to county court—Discretion - - - **282**, **292***n*.
See Practice **2**, **3**.

—— To enforce Canadian judgment in United Kingdom - - - **241**
See Judgments.

ADDITIONAL ASSESSMENT — To income tax — Where surveyor of taxes changes his opinion as to a deduction having been properly made - **220**
See Revenue **7**.

ADJOINING LAND.
See Land.

ADJUSTMENT OF FINANCIAL RELATIONS—Between city and county—On alteration of boundary between them - - - - - **415**
See Local Government **1**.

AFFILIATION ORDER—Order of quarter sessions allowing appeal on ground of insufficent evidence of corroboration—Finality of decision of quarter sessions - - - - - **544**
See Bastardy.

AGREEMENT.
See Contract.

AGRICULTURAL HOLDING — Claim by tenant for compensation for disturbance—Expense reasonably incurred.
See Landlord and Tenant **1**.

AGRICULTURE—Employment in—Employment on fox fur farm - - **675**
See Insurance (Unemployment).

ALTERATION OF AREAS—Act extending boundary of city—Transfer of districts from county to city—Subsequent Act making county council the local authority for certain purposes — Increased burden on county ratepayers—Whether due to extension Act or subsequent Act **415**
See Local Government **1**.

ALTERNATIVE ROUTE—Deviation from chartered voyage—Custom of trade allowing—Sufficiency of evidence
See Shipping **1**. **730**

AMALGAMATION OF COMPANIES — Acquisition of share capital in existing company in exchange for share capital in transferee company —Conveyance or transfer on sale—Stamp duty - - - - **518**
See Revenue **12**.

—— Income tax — Deductions — Losses — Wear and tear allowances—Right to carry forward - - - **566**
See Revenue **2**.

ANNUITY—Instrument securing payment of sum half-yearly in consideration of lump sum—Stamp duty - **551**
See REVENUE **13.**

APPEAL — *From judge at Chambers — Matter of practice and procedure—Application for leave to bring action under Mental Treatment Act,* 1930, *s.* 16—*Rape of girl by escaped mental patient—Question whether Hospital Board acted with reasonable care—Whether appeal from leave lies to Court of Appeal or Divisional Court—R. S. C., Order* LIV., *r.* 23—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 3—*Mental Treatment Act,* 1930 (20 & 21 *Geo.* 5, *c.* 23), *s.* 16, *sub-s.* 1 (2.).
In re SHOESMITH - - **C. A. 637**

—— From justices to Divisional Court—Jurisdiction to hear complaint declined by justices and no adjudication on merits—Power to state case - - - - - **459**
See JUSTICES.

—— From petty sessions to quarter sessions—Against affiliation order—Allowance of appeal—Finality of decision of quarter sessions - - **544**
See BASTARDY.

APPLICATION—For transfer of action of tort from High Court to county court.
See PRACTICE **2, 3.** **282, 292*n*.**

APPORTIONMENT—Of expenses of private street—Street used by both local and through traffic—Power of justices to consider benefit of others than frontagers - - - **654**
See LOCAL GOVERNMENT **5.**

—— Of damages—Between joint-tortfeasors
See NEGLIGENCE. **322**

APPURTENANCE—Of house—Land how far an - - - - - **508**
See LOCAL GOVERNMENT **3.**

AREAS—Alteration of.
See LOCAL GOVERNMENT **1.**

ASSESSMENT—To Government duties.
See REVENUE.

ASSIGNMENT—To retail company—Of subsidiary wholesale company—Succession to business—Income tax **836**
See REVENUE **8.**

ATTACHMENT OF DEBTS — Judgment against husband — Garnishee summons by judgment creditor to attach money in joint bank account of husband and wife—Liability of bank to judgment creditor - **801**
See BANKER.

AVOIDANCE OF SUR-TAX—Transfer of assets to colony — Liability of executors to taxation - - **689**
See REVENUE **9.**

BAILIFF — Distress for rent — Agreement between bailiff and distrainee—— " Walking possession "—Charges paid by distrainee—Validity - **74**
See DISTRESS.

BANKER—*Customer—Joint account in name of husband and wife—Judgment against husband — Attachment of debts—Garnishee order—Service on bank—Liability of bank in respect of joint account.*
HIRSCHORN *v.* EVANS (BARCLAYS BANK, LD., GARNISHEES) - - - **C. A. 801**

BASTARDY—*Affiliation order—Appeal by putative father to quarter sessions—Allowance of appeal on ground of insufficient corroboration of mother's evidence—Decision on merits—Decision of quarter sessions final—No jurisdiction for petty sessions to hear further complaint.*
THE KING *v.* HOWARD AND ANOTHER. *Ex parte* DA COSTA - - **Div. Ct. 544**

BEARER BONDS—Default in interest payments—Sale of coupons—Whether proceeds liable to income tax and sur-tax - - - - **25**
See REVENUE **10.**

BILL OF EXCHANGE—*Words prohibiting transfer — Crossing — " Not negotiable " — To payee's order only—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 81.
HIBERNIAN BANK, LD. *v.* GYSIN AND HANSON - - - - - - **Lewis J. 384**

BILL OF SALE—Security for loan of money
See MONEYLENDER. **559**

BOARD OF CONTROL—Continuance order of—Seal not affixed till after expiry of original order—Validity - **366**
See LOCAL GOVERNMENT **4.**

BOUNDARY—Between city and county—Alteration of — Adjustment of financial relations—Arbitration **415**
See LOCAL GOVERNMENT **1.**

BRANCH OF TREE—Tree on landlord's land—Branch falling upon tenant's adjoining land—Fatal accident to tenant's servant — Which party liable for workmen's compensation
See LANDLORD AND TENANT **2.** **577**

BUSINESS — Succession to — Assignment to retail company of subsidiary wholesale company—Income tax - **836**
See REVENUE **8.**

CANADA—Judgment of court of—Enforcement in United Kingdom—Registration - - - - - **241**
See JUDGMENTS.

CAPITAL OR INCOME—Consideration for licence to use patent—Part lump sum, part annual royalties—Income tax - - - - - **482**
See Revenue **5.**

CASE STATED—No appeal by—Where justices have declined jurisdiction and made no adjudication - **459**
See Justices.

CASES :—

—— *Aga Khan* v. *Times Publishing Co.* [1924] 1 K. B. 675.
Followed. Tudor-Hart *v.* British Union for the Abolition of Vivisection - - **C. A. 329**

—— *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* [1921] 3 K. B. 532.
Applied and followed. Banco de Bilbao *v.* Sancha. Same *v.* Rey **C. A. 176**

—— *Allen and Another* v. *Trehearne* [1937] 2 K. B. 568.
Affirmed - - - **C. A. 464**

—— *Bank of Ethiopia* v. *National Bank of Egypt* [1937] Ch. 513.
Applied and followed. Banco de Bilbao *v.* Sancha - **C. A. 176**

—— *Bell* v. *National Provincial Bank of England* [1904] 1 K. B. 149.
Distinguished. Laycock *v.* Freeman Hardy & Willis, Ld. **Lawrence J. 836**

—— *Bryan* v. *Wetherhead* (1625) Cro. Car. 17.
Followed. Trim *v.* Sturminster R. D. C. - - - **C. A. 508**

—— *Burdon* v. *Gregson & Co.* [1906] 2 K. B. 275, 283.
Considered. Smith *v.* Cammell, Laird & Co. - - **C. A. 700**

—— *Burrell & Son* v. *Leven* (1926) 42 Times L. R. 407.
Approved. Poteliakhoff *v.* Teakle - - - **C. A. 816**

—— *Burtell* v. *W. Gray & Co.* [1902] 1 K. B. 225.
Considered. Smith *v.* Cammell, Laird & Co. - - **C. A. 700**

—— *Caterham Urban District Council* v. *Godstone Rural District Council* [1904] A. C. 171.
Referred to. Oxfordshire County Council *v.* Oxford City Council **C. A. 415**

—— *Cavalier* v. *Pope* [1906] A. C. 428, 430.
Applied. Shirvell *v.* Hackwood Estates Co. - - **C. A. 577**

CASES—*continued.*

—— *Cheater* v. *Cater* [1918] 1 K. B. 247.
Applied. Shirvell *v.* Hackwood Estates Co. - - **C. A. 577**

—— *Chester Corporation* v. *Briggs* [1924] 1 K. B. 239.
Approved, but dictum dissented from. Allen *v.* Hornchurch Urban Council - **Div. Ct. 654**

—— *Constantinesco* v. *R.* (1927) 11 Tax Cas. 730.
Considered and explained. Commissioners of Inland Revenue *v.* British Salmson Aero Engines, Ld. - - - - **C. A. 482**

—— *Culver* v. *Beard* [1938] 2 K. B. 292*n.*
Discussed and commented upon. Phillips *v.* Lloyd & Sons, Ld. **C. A. 282**

—— *Cunard & wife* v. *Antifyre, Ld.* [1933] 1 K. B. 551.
Distinguished. Shirvell *v.* Hackwood Estates Co. - **C. A. 577**

—— *Digby* v. *Financial News, Ld.* [1907] 1 K. B. 502, 508.
Views adopted. Tudor-Hart *v.* British Union for the Abolition of Vivisection - - **C. A. 329**

—— *Evans* v. *Bartlam* [1937] A. C. 473.
Considered and applied. Phillips *v.* A. Lloyd & Sons, Ld. - **C. A. 282**

—— *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1902) 18 Times L. R. 374.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co., Ld. **C. A. 730**

—— *Frenkel* v. *MacAndrews & Co., Ld.* [1929] A. C. 545.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co·, Ld. **C. A. 730**

—— *Glynn* v. *Margetson & Co.* [1893] A. C. 351.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co., Ld. **C. A. 730**

—— *Godstone Rural District Council* v. *Croydon Corporation* (1932) 96 J. P. 271, 275 ; 363, 366.
Obervations considered. Oxfordshire County Council *v.* Oxford City Council - - **C. A. 415**

—— *Grant* v. *Langston* [1900] A. C. 383.
Observations in the House of Lords applied. Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 - **du Parcq J. 210**

CASES—*continued.*

—— *Hobbs* v. *The People Newspaper Publishing Co.*, Times Newspaper, March 30, 1926.
Observations of Atkin L.J. considered and not applied. Tudor-Hart *v.* British Union for the Abolition of Vivisection **C. A. 329**

—— *Holt* v. *Andrew Hobson & Sons* (1930) 23 B. W. C. C. 242.
Views expressed by Lord Hanworth M.R. dissented from. Easterling *v.* Peek, Frean & Co., Ld. **C. A. 300**

—— *Houlder Line* v. *Griffin* [1905] A. C. 220.
Considered. Smith *v.* Cammell, Laird & Co. - - **C. A. 700**

—— *Hyams* v. *Coombes* (1912) 28 Times L. R. 413.
Approved. Poteliakhoff *v.* Teakle - - - **C. A. 816**

—— *Hyams* v. *Stuart King* [1908] 2 K. B. 696.
Considered. Poteliakhoff *v.* Teakle - - - **C. A. 816**

—— *Indian Radio & Cable Communications Co.* v. *Income-tax Commissioner, Bombay Presidency and Aden* [1937] 3 All E. R. 709, 713.
Applied. British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) - **C. A. 220**

—— *Inland Revenue Commissioners* v. *Paget* [1937] 2 K. B. 711.
Affirmed - - - **C. A. 25**

—— *Kawasaki Kisen Kabushiki Kaisha* v. *Bantham Steamship Co.* [1938] 1 K. B. 805.
Decision of Branson J. affirmed **C. A. 790**

—— *Kitchen* v. *Koch & Co.* [1931] A. C. 753, at pp. 764, 765.
Considered and applied. Easterling *v.* Peek, Frean & Co., Ld. - - - - **C. A. 300**

—— *Lanston Monotype Corporation, Ld.* v. *Anderson* [1911] 2 K. B. 1019.
Applied. Commissioners of Inland Revenue *v.* British Salmson Aero Engines, Ld. **C. A. 482**

—— *Leduc & Co.* v. *Ward* (1888) 20 Q. B. D. 475.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co., Ld. **C. A. 730**

CASES—*continued.*

—— *Lever Brothers, Ld.* v. *Commissioners of Inland Revenue* [1938] 1 K. B. 314.
Affirmed - - - **C. A. 518**

—— *Lloyds Bank, Ld.* v. *Bank of America National Trust and Savings Association* [1937] 2 K. B. 631.
Affirmed - - - **C. A. 147**

—— *Lumsden* v. *Burnett* [1898] 2 Q. B. 177.
Considered and distinguished. Day *v.* Davies - - - **C. A. 74**

—— *Macdonald* v. *Tacquah Gold Mines Co.* (1884) 13 Q. B. D. 535.
Applied and followed. Hirschorn *v.* Evans (Barclays Bank, Ld., Garnishees) - - **C. A. 801**

—— *Mackie* v. *James Henry Monks (Preston), Ld.* [1918] A. C. 59.
Considered. Smith *v.* Cammell, Laird & Co. - - **C. A. 700**

—— *Mills* v. *Jones* (1929) 14 Tax Cas. 769.
Considered and explained. Commissioners of Inland Revenue *v.* British Salmson Aero Engines, Ld. - - - - **C. A. 482**

—— *Minister of Agriculture and Fisheries* v. *Dean* [1924] 1 K. B. 851.
Referred to. *In re* Agricultural Holdings Act, 1923. Dunstan *v.* Benney - - - **C. A. 1**

—— *Monk* v. *Warbey* [1935] 1 K. B. 75.
Distinguished. Daniels *v.* Vaux **Humphreys J. 203**

—— *Morgan* v. *Vale of Neath Ry. Co.* (1864) 5 B. & S. 570.
Applied and followed. Radcliffe *v.* Ribble Motor Services, Ld. **C. A. 345**

—— *National Bank* v. *Silke* [1891] 1 Q. B. 435, 439.
Dicta of Lindley and Fry L.JJ. not followed. Hibernian Bank, Ld. *v.* Gysin and Hanson **Lewis J. 384**

—— *Neumann* v. *Inland Revenue Commissioners* [1934] A. C. 215.
Distinguished. Commissioners of Inland Revenue *v.* Cull **C. A. 109**

—— *Paget* v. *Inland Revenue Commissioners* [1937] 2 K. B. 711.
Affirmed - - - **C. A. 25**

—— *Pondicherry Ry. Co.* v. *Commissioner of Income-tax, Madras* [1931] L. R. 58 I. A. 239, 251.
Lord Macmillan's dictum explained. British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) **C. A. 220**

CASES—*continued.*

—— *Reg.* v. *Glynne* (1871) L. R. 7 Q. B. 16. Approved and followed. THE KING *v.* HOWARD AND ANOTHER **Div. Ct. 544**

—— *Reg.* v. *Harrington* (1864) 9 L. T. (N. S.) 721. Approved, but distinguished. THE KING *v.* HOWARD AND ANOTHER **Div. Ct. 544**

—— *Rex* v. *The Board of Control. Ex parte Winterflood* [1938] 1 K. B. 420. Decision of Div. Court reversed **C. A. 366**

—— *Robbins* v. *Jones* (1863) 15 C. B. (N. S.) 221. Applied. SHIRVELL *v.* HACKWOOD ESTATES CO. - - **C. A. 577**

—— *Roura & Forgas* v. *Townend* [1919] 1 K. B. 189. Applied and followed. PETROS M. NOMIKOS, LD. *v.* ROBERTSON **C. A. 603**

—— *Smith's Dock Co.* v. *John Readhead & Sons* [1912] 2 K. B. 323. Approved and followed. SHIRVELL *v.* HACKWOOD ESTATES CO. **C. A. 577**

—— *Stevens* v. *Walker* [1936] 2 K. B. 215. Considered and applied. PHILLIPS *v.* A. LLOYD & SONS, LD. **C. A. 282**

—— *Sutherland* v. *Stopes* [1925] A. C. 47, 62, 77, 99. Views adopted. TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION - - **C. A. 329**

—— *The Tasmania* (1890) 15 App. Cas. 223, 225. Observations applied. SMITH *v.* CAMMELL, LAIRD & CO. **C. A. 700**

—— *Tunney* v. *Midland Ry. Co.* (1866) L. R. 1 C. P. 291. Applied and followed. RADCLIFFE *v.* RIBBLE MOTOR SERVICES, LD. **C. A. 345**

—— *Wade* v. *Simeon* (1846) 2 C. B. 548, 564. Dictum of Tindal C.J. applied. POTELIAKHOFF *v.* TEAKLE **C. A. 816**

—— *Wakefield Local Board* v. *West Riding Ry. Co.* (1866) 30 J. P. 628. Followed. PRATT *v.* A. A. SITES, LD. **Div. Ct. 459**

—— *Weavings* v. *Kirk & Randall* [1904] 1 K. B. 213. Considered. SMITH *v.* CAMMELL, LAIRD & CO. - - **C. A. 700**

CASES—*continued.*

—— *White, Child, & Beney, Ld.* v. *Eagle Star and British Dominions Insurance Co.* (1922) 127 L. T. 571. Applied and followed. BANCO DE BILBAO *v.* SANCHA. SAME *v.* REY **C. A. 176**

—— *Wilmot, In re. Hammersmith (Berghem Mews) Clearance Order* (1937) 157 L. T. 142. Distinguished. *In re* BUTLER. CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936 **du Parcq J. 210**

CERTIFIED INSTITUTION.
See MENTAL HOSPITAL.

CERTIFYING SURGEON — Certificate dated more than six months after disablement—Failure to claim compensation within six months—Reasonable cause for delay - **300**
See WORKMEN'S COMPENSATION **1.**

CHARTERPARTY — Construction — Contract voyage — Deviation — Alternative route — Custom of trade — Evidence - - - - **730**
See SHIPPING **1.**

—— —— Hire—Calculation of to be made on tonnage—Implied obligation of shipowner to supply statement of ship's deadweight - - - **790**
See SHIPPING **2.**

CHEQUE—For gambling debt—Dishonour—Promise of forbearance to sue on cheque—Promise by debtor to pay by instalments — Whether forbearance a good consideration for promise to pay - - - **816**
See GAMING.

CLAIM OF RIGHT TO MONEY—Claim made in good faith but unfounded in law—Whether demanding money with menaces - - - - **264**
See CRIMINAL LAW.

CLEARANCE ORDER — "Houses" — "Other buildings" — Dwellings over garages not correspondingly divided - - - - **210**
See LOCAL GOVERNMENT **2.**

COLLISION — Between motor-cars — Crossroads—Driver crossing against red light—Duty of driver crossing at right angles with green light—Whether contributory negligence
See ROAD TRAFFIC. **393**

COMMON EMPLOYMENT—Drivers of motor coaches carrying parties between the same places—Death of one driver by negligence of another—Liability of employer - - **345**
See MASTER AND SERVANT **1.**

COMPANY—Amalgamation of companies—Income tax—Deductions—Losses—Wear and tear allowances—Right to carry forward - - - 566
See REVENUE 2.

—— Dividend — Payment of without deduction of income tax—Whether equivalent to payment free of tax
See REVENUE 11. 109

COMPENSATION—For increased burden on county ratepayers—On alteration of boundary between city and county
See LOCAL GOVERNMENT 1. 415

—— For tenant of agricultural holding—Expense reasonably incurred in preparation of claim—Fee paid to valuer - - - - - 1
See LANDLORD AND TENANT 1.

—— For workman or dependent.
See WORKMEN'S COMPENSATION.

COMPOSITE STRUCTURE — Garage with dwelling above—Clearance order—" Houses "—" Other buildings "
See LOCAL GOVERNMENT 2. 210

CONSIDERATION—For licence to use patent—Part lump sum and part annual royalties—Income tax - 482
See REVENUE 5.

—— Promise of forbearance to sue on dishonoured cheque for gambling debt—Promise by debtor to pay by instalments—Whether promise of forbearance a good consideration to support promise to pay - - 816
See GAMING.

CONSTABLE—Police officer—Person who holds office under His Majesty 454
See POLICE.

CONSTRUCTION—Of charterparty
See SHIPPING 1, 2. 730, 790

CONSTRUCTIVE TOTAL LOSS—Vessel damaged by fire—Freight not received—No abandonment to hull underwriters—Claim against hull underwriters for partial loss — Claim against freight underwriters for constructive total loss—Whether maintainable - - - 603
See INSURANCE (MARINE).

CONTINUANCE ORDER—Of Board of Control—Seal not affixed till after expiry of original order—Validity
See LOCAL GOVERNMENT 4. 366

CONTRACT—Between bailiff distraining for rent and distrainee — " Walking possession "—Charges paid by distrainee—Validity - - - 74
See DISTRESS.

CONTRACT—*continued.*

—— Between company and another body—To pay percentage of profits for services rendered — Admissible deduction for income tax purposes 220
See REVENUE 7.

—— Between hospital and nurse—Contract of service—Injury to nurse in course of employment—" Workman "—Right to compensation 768
See WORKMEN'S COMPENSATION 3.

—— Between moneylender and borrower—Loan secured by bill of sale—No statement in memorandum of ground on which goods could be seized—Contract unenforceable 559
See MONEYLENDER.

—— Between shipowner and charterer—Voyage—Deviation - - 730
See SHIPPING 1.

—— Consideration — New consideration for payment of illegal debt—Validity
See GAMING. 816

—— Hire-purchase.
See HIRE-PURCHASE.

CONTRIBUTION—As between two defendants in action of negligence—Jurisdiction of Court to make order giving leave to either defendant to make offer to the other to pay on percentage basis - - - 630
See PRACTICE 1.

—— Third-party proceedingsf or—Between joint tortfeasors - - - 322
See NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE.
See NEGLIGENCE.

CONTROL, BOARD OF.
See BOARD OF CONTROL.

CONVEYANCE OR TRANSFER ON SALE—Issue of capital by transferee company in order to acquire further capital of existing company—Stamp duty - - - - - 518
See REVENUE 12.

CORROBORATION—Of mother's evidence—Insufficiency of—Allowance by quarter sessions of appeal against affiliation order—Finality of decision - - - - - 544
See BASTARDY.

COUNCILLORS—For rural district—Election petition—Time expiring on bank holiday—Presentation on following day—Whether in time - - 90
See LOCAL GOVERNMENT 6.

COUNTERCLAIM — By third party — In action against insured—No notice of counterclaim to insurer—Judgment for third party on counterclaim—Claim by third party against insurer—Competence - - 167
See INSURANCE (MOTOR) 1.

COUNTY COURT—Application for transfer to—Of action of tort commenced in High Court—Discretion 282, 292*n*.
See PRACTICE 2, 3.

—— Judge — Appeal to against demolition order—Questions for judge - 508
See LOCAL GOVERNMENT 3.

COUPONS—On bearer bonds—Sale of on default in interest payments—Whether proceeds of sale liable to income tax and sur-tax - 25
See REVENUE 10.

COURT—County court.
See COUNTY COURT.

—— Court of Appeal.
See COURT OF APPEAL.

—— Divisional Court.
See DIVISIONAL COURT.

—— High Court.
See HIGH COURT.

—— Of summary jurisdiction.
See JUSTICES.

—— Petty sessions.
See JUSTICES.

—— Quarter sessions.
See QUARTER SESSIONS.

—— Supreme Court of Ontario—Enforcement of judgment of in United Kingdom—Registration - 241
See JUDGMENTS.

COURT OF APPEAL—Appeal to—From order of judge allowing action against owner of mental hospital—Matter of practice and procedure
See APPEAL. 637

CRIMINAL LAW—*Demanding money with menaces — Claim of right made in good faith — Claim unfounded in law—Conviction quashed —Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 1, 30.
THE KING *v.* BERNHARD - C. C. A. 264

CROSS ROADS—Collision between motor cars—Driver crossing against red light—Negligence—Duty of driver crossing at right angles with green light—Whether contributory negligence - - - - 393
See ROAD TRAFFIC.

CROSSING—Of bill of exchange—Effect of words "not negotiable" - 384
See BILL OF EXCHANGE.

CUSTOM OF TRADE—To permit deviation from chartered voyage—Sufficiency of evidence - - - - 730
See SHIPPING 1.

CUSTOMER—Of bank.
See BANKER.

DAMAGES—Apportionment of — Between joint tortfeasors - - - 322
See NEGLIGENCE.

—— Liquidated damages.
See HIRE-PURCHASE.

—— Prospective award of in action against two defendants—Jurisdiction of Court to make order giving leave to either defendant to make offer to the other on percentage basis - - - - - 630
See PRACTICE 1.

DEADWEIGHT—Implied obligation of shipowner to supply statement of to charterer—Where hire to be calculated on tonnage - - 790
See SHIPPING 2.

DEATH—Of donor of gift inter vivos—Estate duty - - - 684
See REVENUE 1.

—— Of holder of office—Sum becoming payable thereon—Assessment of executors to income tax - - 464
See REVENUE 6.

—— Of person liable for penalty under Income Tax Act—Survival of cause of action against estate of deceased—Claim for penalty not an action in tort - - - - - 826
See REVENUE 4.

—— Of servant of tenant—Consequence of fall of branch from tree on landlord's adjoining land—Compensation paid by tenant to dependant of servant—Right of tenant to indemnity from landlord - - - - 577
See LANDLORD AND TENANT 2.

DEDUCTION — From annual value of premises for income tax—Further rent equal to insurance premium paid by landlord - - - 274
See REVENUE 3.

—— From profits of company's business for income tax—Agreement to pay percentage to another body for technical advice - - - 220
See REVENUE 7.

—— From taxable income—On amalgamation of companies—Losses—Wear and tear allowances—Right to carry forward - - - - 566
See REVENUE 2.

DEDUCTION—*continued.*

—— From wages ot manual worker for food —Illegality - - - - - **51**
See Master and Servant **2.**

—— Of income tax—Payment of dividend without—Whether equivalent to payment free of tax - - **109**
See Revenue **11.**

DE FACTO GOVERNMENT—Over part of foreign country—De jure government over whole country—Recognition by British Government of both these governments—By what law validity of acts in that part of the country to be determined - **176**
See International Law.

DEFAMATION — Libel — " Rolled-up plea " of fair comment—Particulars - **329**
See Practice **4.**

DEFAULT—In interest payments on bearer bonds—Sale of coupons—Whether proceeds liable to income tax and sur-tax - - - - - **25**
See Revenue **10.**

DE JURE GOVERNMENT—Over whole of foreign country—De facto government over part—Recognition by British Government of both these governments—By which law validity of acts in that part of the country to be determined - **176**
See International Law.

DEMANDING MONEY WITH MENACES—Claim of right made in good faith—Claim unfounded in law —Competence - - - - **264**
See Criminal Law.

DEMOLITION ORDER—Under Housing Acts —Considerations previous to making of - - - - - - - **508**
See Local Government **3.**

DEPENDANT—Of workman killed in accident—Compensation paid to by employer—Right of employer to indemnity from person legally liable for accident - - - - **577**
See Landlord and Tenant **2.**

DEVIATION — From chartered voyage — Alternative route—Custom of trade
See Shipping **1.** **730**

DISABLEMENT OF WORKMAN—Failure to claim compensation within six months—Certificate of surgeon dated after six months—Reasonable cause for delay in making claim - **300**
See Workmen's Compensation **1.**

DISCRETION—Of High Court judge—As to transfer of action of tort from High Court to county court
See Practice **2, 3.** **282, 292***n.*

DISCRETION—*continued.*

—— —— In proceedings for contribution between joint tortfeasors—To apportion responsibility and damages
See Negligence. **322**

DISEASE.
See Industrial Disease.

DISHONOUR—Of cheque for gambling debt —Promise of forbearance to sue on cheque—Promise by debtor to pay by instalments—Whether former promise a good consideration for latter - - - - - **816**
See Gaming.

DISTRESS—*Arrears of rent—Bailiff in possession—Agreement between bailiff and distrainee — " Walking possession "—Charges paid by distrainee—Claim by distrainee for return of money paid to bailiff—Whether bailiff's charges valid—Effect of agreement—Statutory prohibition on fees above certain scale—Real possession only—Distress (Costs) Act,* 1817 (57 *Geo.* 3, *c.* 93), *s.* 1—*Distress (Costs) Act,* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Law of Distress Amendment Act,* 1888 (51 *&* 52 *Vict. c.* 21), *s.* 8—*Distress for Rent Rules,* 1920, *St. R. & O., No.* 1712/*L.* 47, *r.* 22; *Appendix II., Scale II.* (2.).
Day *v.* Davies - - - **C. A. 74**

DISTURBANCE—Claim by tenant of agricultural holding for compensation for—Expense reasonably incurred—Fee paid to valuer - - - - **1**
See Landlord and Tenant **1.**

DIVIDEND—Payment of without deduction of income tax—Whether equivalent for income tax purposes to payment free of tax - - - - **109**
See Revenue **11.**

DIVISIONAL COURT—Whether appeal lies to—From order of judge allowing action against mental hospital board
See Appeal. **637**

DOCK—Ship lying in—Staging erected in forehold—User of by insulation company doing work on ship—Whether a factory - - **700**
See Factory.

DWELLING-HOUSE—Cottage with adjoining land—" House "—Land how far an " appurtenance " of house
See Local Government **3.** **508**

ELECTION PETITION—On election of rural district councillors—Time expiring on bank holiday—Presentation on following day—Whether in time **90**
See Local Government **6.**

EMOLUMENTS—Of office—Sum payable on termination of office—Termination by death—Assessment of executors to income tax in respect of terminal payment - - - - **464**
See REVENUE **6.**

EMPLOYER AND WORKMAN.
See MASTER AND SERVANT, and WORKMEN'S COMPENSATION.

—— On fox fur farm—Employment in agriculture - - - - **675**
See INSURANCE (UNEMPLOYMENT).

—— Profits of — Terminal payment — Income tax - - - - **464**
See REVENUE **6.**

EMPLOYMENT—Injury by accident arising out of—Hospital nurse injured by explosion of preparation for patient —Right to compensation - **768**
See WORKMEN'S COMPENSATION **3.**

ENFORCEMENT—Of Canadian judgment in United Kingdom—Registration **241**
See JUDGMENTS.

ESTATE DUTY—Gift inter vivos—Death of donor—Insolvency of free estate—Assessment of gift for duty—No allowance for debts - - **684**
See REVENUE **1.**

EVIDENCE — Admissibility — To vary terms of charterparty as to course of voyage - - - - **730**
See SHIPPING **1.**

—— Sufficiency — To prove custom of trade allowing deviation from chartered voyage - - - - - **730**
See SHIPPING **1.**

EXECUTOR—Liability to sur-tax—Where assets transferred to colony for purpose of avoiding taxation **689**
See REVENUE **9.**

EXPENSES—Of private street works—Apportionment—Power of justices to consider benefit to others than frontagers - - - - **654**
See LOCAL GOVERNMENT **5.**

FACTORY—*Shipbuilder's yard, including dock —Newly-built ship undergoing completion in dock—Staging in forehold erected by shipbuilder in course of his work—Insulation company employed by shipowner afterwards allowed by shipbuilder to use staging for their work—Defect in staging—Accident to workman employed by insulation company—Staging constituting a factory—Occupier of factory, whether shipbuilder or insulation company—Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 82, 104, *sub-s.* 1 (*iii.*); *s.* 149, *sub-ss.* 1, 2; *s.* 151; *Sixth Schedule, Part II.* (25.)— *Shipbuilding Regulations,* 1931, *Part II., reg.* 11 (*b*).
SMITH *v.* CAMMELL, LAIRD & CO., LD. **C. A. 700**

FAIR COMMENT—"Rolled up plea" of in libel action—Particulars - **329**
See PRACTICE **4.**

FATAL ACCIDENT—To driver of motor coach—By negligence of another driver in the same employment and traversing the same route—Liability of employer - - - **345**
See MASTER AND SERVANT **1.**

FELLOW WORKMEN—Drivers of motor coaches traversing the same route—Death of one by negligence of another—Liability of employer—Common employment - - **345**
See MASTER AND SERVANT **1.**

FOREHOLD—Of ship lying in dock—Staging erected in—User of by insulation company doing work on ship—Whether a factory - - **700**
See FACTORY.

FOX FUR FARM—Employment on—Employment in agriculture - **675**
See INSURANCE (UNEMPLOYMENT).

FREIGHT INSURANCE—Liability of freight underwriters for constructive total loss—Where no notice of abandonment, or recovery for such loss from hull underwriters - - **603**
See INSURANCE (MARINE).

FRONTAGES—On street used for both local and through traffic—Private street works—Apportionment of expenses —Power of justices to consider benefit to non-frontagers - **654**
See LOCAL GOVERNMENT **5.**

GAMBLING DEBT—
See GAMING.

GAMING—*Gambling debt—Cheque given in payment of debt—Dishonour of cheque—Threat of publicity by bringing action on cheque—Forbearance to sue—Promise to pay cheque by instalments—Whether new consideration—Gaming Act,* 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18.
POTELIAKHOFF *v.* TEAKLE - **C. A. 816**

GARNISHEE SUMMONS — By judgment creditor of husband to attach money in joint bank account of husband and wife—Liability of bank in respect of joint account - **801**
See BANKER.

GIFT INTER VIVOS—Estate duty—Death within three years of gift—Insolvency of free estate—Assessment of gift for duty—No allowance for debts - - - - - **684**
See REVENUE **1.**

HABEAS CORPUS—For mental defective detained under alleged invalid order
See LOCAL GOVERNMENT **4.** **366**

HIGH COURT—Action of tort commenced in—Application for transfer to county court—Discretion **282, 292***n*.
See Practice **2, 3.**

—— Jurisdiction—In action of negligence against two defendants—To make order giving either defendant leave to make to other an offer to pay damages on percentage basis - **630**
See Practice **1.**

—— K. B. D.—Revenue side—Subpœna—Service out of jurisdiction—Leave not obtained—Validity of proceedings - - - - **531**
See Practice **5.**

HIRE—Of ship—Hire to be calculated on tonnage—Implied obligation of shipowner to supply statement of ship's deadweight to charterers **790**
See Shipping **2.**

HIRE PURCHASE—*Agreement for letting on hire—Tandem bicycle—Model form of agreement—Payments by instalments—Option for hirer to return goods before all instalments paid—Exercise of right by hirer—Liquidated damages or penalty—" Minimum payment " clause—Right of owner to claim for user under terms of agreement.*
Associated Distributors, Ld. *v.* Hall. **C. A. 83**

HOLDING.
See Agricultural Holding.

HOSPITAL—Injury to nurse by explosion of preparation for patient—Right of nurse to compensation - **768**
See Workmen's Compensation **3.**

—— Mental hospital—Owner of—Action against—Order of judge giving leave for—Appeal from—Whether to Court of Appeal or Divisional Court - - - - - **637**
See Appeal.

HOUSING.
See Local Government.

HULL INSURANCE—Freight insurance incorporating Institute Time Clauses, Freight—Vessel damaged by fire—Freight not received—Liability of freight underwriters for constructive total loss—Where no notice of abandonment, or recovery for such a loss from hull underwriters - **603**
See Insurance (Marine).

HUMAN HABITATION—House whether fit for—Demolition order - **508**
See Local Government **3.**

HUSBAND AND WIFE—Joint account with bank—Judgment against husband—Garnishee summons to attach money in joint account—Liability of bank to judgment creditor - - **801**
See Banker.

INCOME OR CAPITAL—Consideration for licence to use patent—Part lump sum and part annual royalty—Income tax - - - - **482**
See Revenue **5.**

INCOME TAX.
See Revenue.

INDEMNITY—Right to of employer who has paid compensation in respect of accident to workman—Against person under legal liability for accident
See Landlord and Tenant **2. 577**

—— —— Right to further indemnity for further compensation - - **16**
See Workmen's Compensation **2.**

—— Third party proceedings for—Between joint tortfeasors - - - **322**
See Negligence.

INDUSTRIAL DISEASE—Failure to claim compensation within six months—Certificate of surgeon dated after six months—Reasonable cause for delay in making claim - - **300**
See Workmen's Compensation **1.**

INJURY.
See Personal Injury.

INSTALMENTS—Payment by, under hire-purchase agreement—Option for hirer to return goods before all instalments paid—Exercise of right by hirer—Right of owner to claim for user - - - - - **83**
See Hire Purchase.

INSTITUTE TIME CLAUSES, FREIGHT—Incorporation in insurance on freight—Vessel damaged—Freight not received—Right of shipowner to recover from freight underwriters
See Insurance (Marine). **603**

INSURANCE (FIRE)—Premium paid by landlord—Covenant by lessee to pay further rent equal to premium paid by landlord—Deduction from annual value for income tax - **274**
See Revenue **3.**

INSURANCE (MARINE)—*Insurance on hull—Insurance on freight—" In the event of " constructive total loss of steamer "—Incorporation of Institute Time Clauses, Freight—Vessel damaged by fire—Cost of repairs more than insured value—Vessel when repaired worth more than cost of repairs—Charterparty not performed—Freight not received—No abandonment to hull underwriters—Claim against hull underwriters for partial loss—Claim against freight underwriters for constructive total loss—Whether maintainable—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60, *sub-ss.* 1, 2 ; *s.* 61.
Petros M. Nomikos, Ld. *v.* Robertson **C. A. 603**

INSURANCE (MOTOR)—*Third-party risks—Accident involving three persons—Action by one against owner of motor-car—Service of Third-party notice—Notice to insurers—Counterclaim by third party against owner of motor-car—No notice of counterclaim to insurers—Judgment for third party on counterclaim—Claim by third party against insurers—" Proceedings in which the judgment was given "—Effect of absence of notice of counterclaim—Road Traffic Act,* 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 2, 3.
CROSS *v.* BRITISH OAK INSURANCE CO., LD. - - - - **du Parcq J. 167**

2. —— —— *Gift or loan of car by registered owner—Lapsed policy—Owner's liability to third party—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35.
DANIELS *v.* VAUX - **Humphreys J. 203**

INSURANCE (UNEMPLOYMENT)—*Employment on fox fur farm—Employment in agriculture—Unemployment Insurance Act,* 1935 (25 *Geo.* 5, *c.* 8), *s.* 3, *Sch. I., Parts I., II.—Unemployment Insurance (Agriculture) Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 13), *s.* 1.
In re THE UNEMPLOYMENT INSURANCE ACT, 1935, AND *In re* AN APPLICATION BY STEPHENS AND OTHERS - **Branson J. 675**

INTEREST—Default in payment of—On bearer bonds—Sale of coupons—Whether proceeds liable to income tax and sur-tax - - - **25**
See REVENUE **10.**

INTERNATIONAL LAW—*De facto government over part of foreign country—Rival government claiming jurisdiction over whole country—Recognition by British Government of the two governments as de facto government and de jure government respectively—Validity of acts of the two governments—Principal and agent—Power of attorney—Bank—Appointment of new board of directors—Claim to possession of London branch.*
BANCO DE BILBAO *v.* SANCHA. SAME *v.* REY - - - - - - **C. A. 176**

JOINT ACCOUNT—With bank in name of husband and wife — Judgment against husband—Garnishee summons to attach money in joint account — Liability of bank to judgment creditor - - **801**
See BANKER.

JOINT TORTFEASORS—Third-party proceedings between—For indemnity or contribution - - - **322**
See NEGLIGENCE.

JUDGMENTS—*Canada—Supreme Court of Ontario—Enforcement in United Kingdom—Registration—Administration of Justice Act,* 1920 (10 & 11 *Geo.* 5, *c.* 81), *ss.* 9, 14—*Foreign Judgments (Reciprocal Enforcement)*

JUDGMENT—*continued.*

Act, 1933 (23 *Geo.* 5, *c.* 13), *ss.* 1, 2, 6, 7—*Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order in Council,* 1933 (*St. R. & O.* 1933, *No.* 1073).
YUKON CONSOLIDATED GOLD CORPORATION, LD. *v.* CLARK - - - - **C. A. 241**

JURISDICTION—Of High Court—In action of negligence against two defendants—To make order giving either defendant leave to make to other an offer to pay damages on percentage basis - - - **630**
See PRACTICE **1.**

—— Of justices—Absence of—To vary rule of apportionment on frontagers of expenses of street works - **654**
See LOCAL GOVERNMENT **5.**

—— —— Declinature of and no adjudication on merits—Power to state case - - - - - **459**
See JUSTICES.

—— —— To hear further complaint—After allowance by quarter sessions of appeal against previous affiliation order - - - - - **544**
See BASTARDY.

—— Service out of—Writ of subpœna—Leave not obtained—Validity of proceedings - - - - **531**
See PRACTICE **5.**

JUSTICES—*Appeal—Case stated—Jurisdiction to hear complaint declined by justices—No adjudication on merits—Power to state case*
Wakefield Local Board v. *West Riding Ry. Co.* (1866) 30 J. P. 628 followed.
PRATT *v.* A. A. SITES, LD. - **Div. Ct. 459**

—— Bastardy order—Allowance of appeal by quarter sessions—Finality of decision of quarter sessions - **544**
See BASTARDY.

—— —— Jurisdiction—Absence of—To vary rule of apportionment on frontagers of expenses of street works - - - - **654**
See LOCAL GOVERNMENT **5.**

LAND—Of tenant adjoining other land of landlord—Death of tenant's servant by fall of branch from tree on landlord's land—Compensation paid by tenant—Right to indemnity from landlord - - - **577**
See LANDLORD AND TENANT **2.**

—— To what extent an appurtenance of a house - - - - - **508**
See LOCAL GOVERNMENT **3.**

LANDLORD AND TENANT—*Agricultural holding—Notice to quit by landlord—Allegation that tenant not cultivating according to rules of good husbandry—Valuer immediately employed by tenant to examine holding in order to disprove allegation—Fee paid by tenant to valuer—No expenses incurred by tenant for sale or removal of goods—Claim by tenant for compensation for disturbance—Expense reasonably incurred by tenant in preparation of claim—Agricultural Holdings Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-ss.* 1, 6.
In re Agricultural Holdings Act, 1923. Dunstan *v.* Benney and Others - **C. A. 1**

—— *Branch overhanging tenant's land of tree partly dead growing on landlord's adjoining land—Servant of tenant killed by fall of branch—Compensation paid by tenant to widow of deceased servant —Action by tenant against landlord for indemnity or damages—Liability of landlord—Workmen's Compensation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 30, *sub-s.* 2.
Shirvell *v.* Hackwood Estates Co., Ld. **C. A. 577**

—— Lease—Rent—Income tax - - **274**
See Revenue **3.**

LEASE—Rent—Covenant by tenant to pay further rent equal to insurance premium paid by lessor—Deduction from annual value for income tax **274**
See Revenue **3.**

LIBEL—" Rolled-up plea " of fair comment —Particulars - - - **329**
See Practice **4.**

LICENCE—To use patent—Consideration—Part lump sum and part annual royalties—Income tax - **482**
See Revenue **5.**

LIMITATION OF TIME—Claim by worker for amount deducted from wages for food—Debt on a specialty - **51**
See Master and Servant **2.**

LIQUIDATED DAMAGES—Or penalty—Option under hire purchase agreement for hirer to return goods before all instalments paid—Right of owner to claim for user - **83**
See Hire Purchase.

LOAN—Advance secured by bill of sale—Memorandum of contract—No statement in of ground on which goods could be seized—Contract unenforceable - - - - **559**
See Moneylender.

—— Of motor car by registered owner—Lapsed policy of insurance—Owner's liability to third party **203**
See Insurance (Motor) **2.**

LOSSES — In business — Deduction from taxable income—On amalgamation of companies—Right to carry forward - - - - - **566**
See Revenue **2.**

LOCAL GOVERNMENT—*Alteration of areas—Act extending boundary of city—Tranfer of districts from county to city—Subsequent Act making county council the district road authority and the poor law authority—Increased burden on county ratepayers—Adjustment of financial relations—Increased burden whether due to extension Act or to subsequent Act—Arbitration—Amount of compensation—Oxford Extension Act*, 1928 (18 *&* 19 *Geo.* 5, *c. lxxxiv.*), *ss.* 4, 5, 33, 61—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 62—*Local Government (Adjustments) Act*, 1913 (2 *&* 3 *Geo.* 5, *c.* 19), *s.* 1; *Schedule, Part II.* (1.), (2.), (3.)—*Local Government Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 113, *sub-ss.* 1, 2; *s.* 117, *sub-s.* 4.
Oxfordshire County Council *v.* Oxford City Council - - - - **C. A. 415**

2. —— *Housing — Clearance order — " Houses " — " Other buildings " — Dwelling accommodation over garages—Housing Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 25, 26, *Sch. III.*, *para.* 2.
In re Butler. Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936. **du Parcq J. 210**

3. —— —— *House suitable for occupation by persons of the working classes—Small dwelling-house with adjoining land—" House " —Land whether an " appurtenance " of house —Housing Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 11, 15, 188, *sub-s.* 1.
Trim *v.* Sturminster Rural District Council - - - - - **C. A. 508**

4. —— *Mental defective—Order placing defective under guardianship—Expiration of order—Continuance order not sealed till after date of expiration of original order—Validity—Habeas corpus—Mental Deficiency Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 11, *sub-ss.* 1, 2.
The King *v.* The Board of Control. *Ex parte* Winterflood - - **C. A. 366**

5. —— *Private Street Works—Street used both by local and through traffic—Apportionment on frontagers only—Street wider than required by local traffic only—No resolution by local authority to vary widths of carriageway and footways nor to contribute to expenses—Reasonableness of works—Power of justices to consider benefit to others than frontagers—Private Street Works Act*, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 7, 10, 15—*Public Health Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 71), *s.* 35.
Allen and Another *v.* Hornchurch Urban Distict Council - **Div. Ct. 654**

6. —— *Rural district — Election of councillors — Alleged illegal practice — Election petition — Time expiring on bank holiday—Presentation of petition on following*

LOCAL GOVERNMENT—*continued.*
day—Whether in time—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s,* 100, *sub-ss.* 1, 2, 3—*Municipal Election Rules,* 1883, *r.* 38—*Municipal Elections (Corrupt and Illegal Practices) Act,* 1884 (47 *&* 48 *Vict. c.* 70), *s.* 25, *sub-s.* 1 (*as adapted and altered by the Rural District Councillors Election Rules,* 1934 (*St. R. & O.* 1934, *No.* 546, *r.* 5, *sub-r.* 5), *s.* 30—*Municipal Elections (Corrupt and Illegal Practices) Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 7), *s.* 1, *sub-s.* 1; *s.* 2—*Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 40, *sub-ss.* 1, 2; *s.* 295.
In re Counter's Petition. Buckingham *v.* Counter - - - - **C. A. 90**

MANUAL WORKER—Packer employed by wholesale drapers—Deduction from wages for food—Illegality - **51**
See Master and Servant **2.**

MARINE INSURANCE
See Insurance (Marine).

MASTER AND SERVANT—*Common employment—Drivers of motor-coaches—Coaches engaged to carry three parties from a certain place to the same destination—Return journey to garage—Death of one driver owing to negligence of another driver—Liability of employers.*
Radcliffe *v.* Ribble Motor Services, Ld. - - - - - - **C. A. 345**

2. —— *Packer employed by wholesale drapers—Manual labour—Deductions from wages for food—Part of wages paid otherwise than in current coin of the realm—Illegality—Claim for recovery of amounts deducted—Limitation of time—Debt on a specialty—Claim under statute—Truck Act,* 1831 (1 *&* 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 23—*Truck Amendment Act,* 1887 (50 *&* 51 *Vict. c.* 46), *s.* 2—*Civil Procedure Act,* 1833 (3 *&* 4 *Will* 4, *c.* 42), *s.* 3.
Pratt *v.* Cook, Son and Company (St. Paul's), Ld. - - **Wrottesley J. 51**

—— Registered owner lending motor-car to son—Lapsed policy—Owner's liability to third party - **203**
See Insurance (Motor) **2.**

—— Service contract between hospital and nurse—Injury to nurse in course of employment—"Workman"—Right to compensation - - **768**
See Workmen's Compensation **3.**

MEMORANDUM—Of contract of loan—No statement in of ground on which goods could be seized—Contract unenforceable - - - **559**
See Moneylender.

MENACES—Demanding money with—Claim of right made in good faith but unfounded in law - - **264**
See Criminal Law.

MENTAL DEFECTIVE—Expiration of guardianship order—Continuance order not sealed till after expiration of original order—Validity - **366**
See Local Government **4.**

MENTAL HOSPITAL—Owner of—Action against—Order of judge giving leave for—Appeal from—Whether to Court of Appeal or Divisional Court
See Appeal. **637**

MERCANTILE AGENT—Pledge of documents—Surrender by pledgees to pledgors as trustees for sale—Unauthorized pledge of documents by pledgors to third parties—Validity of second pledge - - - - **147**
See Principal and Agent.

MONEY—Claim to in good faith but unfounded—Whether demanding with menaces - - - - **264**
See Criminal Law.

MONEYLENDER—*Loan secured by bill of sale—Memorandum of contract—No statement therein of particular statutory ground on which goods could be seized—Failure to state in memorandum all the terms of the contract—Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 7, 9, *Schedule—Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.
Mitchener *v.* Equitable Investment Co., Ld. - - - **Lawrence J. 559**

MOTOR-CAR—Collision—Cross-roads—Traffic lights—Driver crossing against red light—Duty of driver crossing at right angles with green light - - - - - **393**
See Road Traffic.

—— Insurance.
See Insurance (Motor).

MOVING RECEPTACLE—Box-tricycle—Sale of article from in street not prohibited - - - - - **198**
See Street Trading.

MUNICIPAL BOUNDARY—Alteration of—Adjustment of financial relations—Arbitration - - - - **415**
See Local Government **1.**

NEGLIGENCE—*Injury to person—Open cellar flap in pavement—Damages against coal merchant and householder—Third-party proceedings for indemnity or contribution—"Just and equitable"—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 2.
Daniel *v.* Rickett, Cockerell & Co., Ld. and Raymond - - **Hilbery J. 322**

NEGLIGENCE—*continued.*

—— Of driver of motor-car—Crossing at cross-roads against red light—Driver crossing at right angles with green light — Collision — Duty of latter driver — Whether contributory negligence - - **393**
See ROAD TRAFFIC.

—— Of fellow servant engaged in common employment—Implied acceptance of risk of by servant - - - **345**
See MASTER AND SERVANT **1.**

—— Of two defendants—Third-party notice by one defendant to the other claiming contribution—Jurisdiction to make order giving either defendant leave to make offer on percentage basis—Offer to be treated as notice of payment into Court **630**
See PRACTICE **1.**

NOT NEGOTIABLE — Meaning of that expression - - - - **384**
See BILL OF EXCHANGE.

NOTICE — Of abandonment — Of damaged vessel to hull underwriters—Absence of—Claim against freight underwriters for constructive total loss—Whether maintainable - - **603**
See INSURANCE (MARINE).

—— Of counterclaim by third party in action against insured owner of motor-car—Absence of—Claim by third party against insurer—Competence - - - - **167**
See INSURANCE (MOTOR) **1.**

—— Of payment into Court.
See PAYMENT INTO COURT.

—— To third party.
See THIRD-PARTY NOTICE.

NOTICE TO QUIT—By landlord to tenant of agricultural holding on ground of improper cultivation—Fee paid by tenant to valuer to disprove allegation—Claim by tenant for compensation—Expense reasonably incurred
See LANDLORD AND TENANT **1.** **1**

NURSE—Employment of in hospital—Injury to by explosion of preparation for patient — Right of nurse to compensation - - - **768**
See WORKMEN'S COMPENSATION **3.**

OCCUPIER—Of factory—Insulation company using scaffolding in forehold of ship - - - - - **700**
See FACTORY.

OFFICE OR EMPLOYMENT—Profits of—Sum payable on termination of office—Office terminated by death—Assessment of executors to income tax in respect of terminal payment
See REVENUE **6.** **464**

OFFICER—Of police—Person who holds office under His Majesty - - **454**
See POLICE.

OFFICIAL SECRET — Information entrusted in confidence to person by police officer — Communication of to another person - - - **454**
See POLICE.

ONTARIO—Judgment of court of—Enforcement in United Kingdom — Registration - - - - **241**
See JUDGMENTS.

OPTION—Under hire purchase agreement—For hirer to return goods before all instalments paid—Right of owner to claim for user under agreement **83**
See HIRE-PURCHASE.

ORDER—Of Board of Control—Continuance order not sealed till after expiration of original order—Validity - **366**
See LOCAL GOVERNMENT **4.**

—— That one of two defendants have leave to offer to contribute to damages on percentage basis—Jurisdiction of Court to make - **630**
See PRACTICE **1.**

" OWNER " — Pledge of documents by — Surrender by pledgee to pledgor as trustee for sale — Unauthorized pledge of documents by pledgor to third party — Validity of second pledge - - - - - **147**
See PRINCIPAL AND AGENT.

PARTICULARS — Of " rolled-up plea " of fair comment—In libel action **329**
See PRACTICE **4.**

PATENT — Licence — Consideration — Part lump sum and part annual royalties —Capital or income—Income tax
See REVENUE **5.** **482**

PAYMENT INTO COURT—Notice of—Whether offer by one of two defendants to contribute to damages on percentage basis can be treated as
See PRACTICE **1.** **630**

PENALTY—Or liquidated damages—Option under hire purchase agreement for hirer to return goods before all instalments paid—Right of owner to claim for user - - - **83**
See HIRE-PURCHASE.

—— Under Income Tax Act—Survival of cause of action for against estate of deceased—Claim for, not an action in tort - - - **826**
See REVENUE **4.**

PERSONAL INJURY — Action for commenced in High Court—Application by defendant for transfer to county court—Discretion - **282, 292***n.*
See PRACTICE **2, 3.**

PERSONAL INJURY—*continued.*

—— To fellow-employee—Common employment—Implied acceptance of risk
See MASTER AND SERVANT **1.** **345**

—— To workman—Compensation.
See WORKMEN'S COMPENSATION.

PETITION—Election petition.
See ELECTION PETITION.

PETTY SESSIONS.
See JUSTICES.

PLEA OF RES JUDICATA.
See WORKMEN'S COMPENSATION **3.**

PLEDGE — Of documents — Surrender by pledgee to pledgor as trustee for sale—Unauthorized pledge by pledgor to third parties—Validity of second pledge - - - - - **147**
See PRINCIPAL AND AGENT.

POLICE—*Police officer—" Person who holds " office under His Majesty "—Official Secrets Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 28), *s.* 2, *sub-s.* 1.
LEWIS *v.* CATTLE - - - **Div. Ct. 454**

POLICY—Instrument securing payment of sum half-yearly in consideration of lump sum—Annuity—Stamp duty
See REVENUE **13.** **551**

PRACTICE—*Action of negligence against two defendants—Third-party notice by one defendant against the other defendant claiming contribution—Application for order that either defendant have leave to write letter to other defendant making offer on percentage basis—Offer to be treated as notice of payment into Court—No power to make such order—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6—*Rules of the Supreme Court, Order* XXII., *r.* 6; *Order* XXX., *r.* 2.
SIGLEY *v.* HALE AND ANOTHER. WILSON, THIRD PARTY - - - **C. A. 630**

2. —— *Action of tort—Allegation of negligence and breach of statutory duty—Action commenced in High Court—Application by defendant for transfer of action to county court—Discretion of judge—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 46.
PHILLIPS *v.* A. LLOYD & SONS, LD.
C. A. 282

3. —— —— *Claim for damages for personal injuries—Alleged negligence of defendant—Application to transfer action to county court—Discretion of judge—County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *s.* 2.
CULVER (AN INFANT) *v.* BEARD AND OTHERS - - - - - **C. A. 292*n*.**

PRACTICE—*continued.*

4. —— *Libel—Plea of fair comment—" Rolled-up plea "—Fair comment on " the " said facts "—Particulars—Whether necessary to distinguish between allegations of fact and comments—Whether necessary to specify facts forming basis of comments.*
TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION - **C. A. 329**

5. —— *Procedure — Revenue side — Writ of subpœna—Service out of jurisdiction—Leave for service not obtained—Validity of proceedings — Crown Suits, etc., Act,* 1865 (28 *&* 29 *Vict. c.* 104), *s.* 37—*Rules of Supreme Court, Order* XI., *rr.* 1, 11; *Order* LXVIII., *r.* 3.
ATTORNEY-GENERAL *v.* PROSSOR. **C. A. 531**

—— Procedure and practice—Matter of—Order of judge at Chambers for leave to bring action against owner of mental institution—Appeal from—Whether to Court of Appeal or Divisional Court - - - **637**
See APPEAL.

PREMIUM—For insurance against fire payment by landlord—Covenant by tenant to pay further rent equal to premium—Deduction from annual value for income tax - - **274**
See REVENUE **3.**

PRINCIPAL AND AGENT — *Mercantile agent—Pledge of documents—Surrender by pledgees to pledgors as trustees for sale—Unauthorized pledge of documents by pledgors to third parties—" Owner "—" Mercantile Agent " — Validity of second pledge—Factors Act,* 1889 (52 *&* 53 *Vict. c.* 45), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.
LLOYDS BANK, LD. *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
C. A. 147

—— Motor-car lent by registered owner to son—Lapsed policy—Owner's liability to third party - - **203**
See INSURANCE (MOTOR) **2.**

PRIVATE STREET WORKS—Street used by both local and through traffic—Apportionment on frontagers only—Power of justices to consider benefit to others than frontagers **654**
See LOCAL GOVERNMENT **5.**

PROCEDURE.
See PRACTICE.

PROFITS—Of business—Agreement to pay percentage of net profits for services rendered — Admissible deduction for income tax purposes - **220**
See REVENUE **7.**

—— Of office—Sum payable on termination of office—Office terminated by death—Assessment of executors to income tax in respect of terminal payment - - - - **464**
See REVENUE **6.**

PROOF.
See Evidence.

QUARTER SESSIONS—Allowance by of appeal against affiliation order—Finality of decision - - **544**
See Bastardy.

—— Jurisdiction — Absence of—To vary apportionment of expenses of private street works - - - **654**
See Local Government **5.**

RACK RENT — Lease — Covenant by lessee to pay further rent equal to insurance premium paid by lessor—Deduction from annual value for income tax - - - - **274**
See Revenue **3.**

RATEPAYERS — Of county — Increased burden on—Resulting from alteration of boundary between city and county - - - - **415**
See Local Government **1.**

REASONABLE CAUSE—For workman's failure to claim compensation within six months—Certificate of surgeon not dated within six months - **300**
See Workmen's Compensation **1.**

RECOGNITION—By British Government—Of de jure government over whole of foreign country and of de facto government over part—By what law validity of acts in that part to be determined - - - **176**
See International Law.

REGISTRATION — Of Colonial judgment—Absence of—Right to enforce by action in United Kingdom - **241**
See Judgments.

RENT — Arrears — Bailiff in possession — Agreement between bailiff and distrainee — "Walking possession" —Charges paid by distrainee—Validity - - - - **74**
See Distress.

—— Covenant by lessee to pay further rent equal to insurance premium paid by lessor — Deduction from annual value for income tax - - **274**
See Revenue **3.**

REPAYMENT—Annuity whether by way of —Stamp duty - - - **551**
See Revenue **13.**

RES JUDICATA—Plea of.
See Workmen's Compensation **2.**

REVENUE—*Estate duty—Gifts inter vivos—Death occurring within three years of gifts—Insolvency of free estate—Assessment of value of gifts for estate duty—No allowance for debts—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1.
In re Barnes (Deceased) **Lawrence J. 684**

REVENUE—*continued.*

2. —— *Income Tax — Companies — Amalgamation — Deductions — Losses — Wear and Tear Allowances—Right to carry forward—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., rr.* 6, 11—*Finance Act*, 1926 (16 & 17 *Geo.* 5, *c.* 22), *ss.* 32, 33—*Companies Act*, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 153, 154.
United Steel Companies Ld. *v.* Cullington (Inspector of Taxes)
Lawrence J. 566

3. —— —— *Lease—Rack rent—Covenant by lessee to pay "further rent equal to insurance "premium paid by lessors"—Covenant by lessors to insure — Deductions — Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A, No. I., Rule* 1; *No. IV., Rule* 10; *No. V., Rules* 7, 8.
House and Property Investment Co., Ld. *v.* Kneen (Inspector of Taxes)
Lawrence J. 274

4. —— —— *Liability for penalty—Death of person liable—Survival of cause of action against estate of deceased—Claim for penalty not an action in tort—Debt created by statute—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 30, *sub-s.* 1—*Law Reform (Miscellaneous Provisions) Act*, 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1.
Attorney-General *v.* Canter
Lawrence J. 826

5. —— —— *Patent—Grant of exclusive licence—Consideration—In part lump sum payable in three instalments—In part annual royalties—Capital or income—Lump sum a capital sum—Royalties subject to income tax—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3 (*m*); *All Schedules Rules, rr.* 19, 21.
Commissioners of Inland Revenue *v.* British Salmson Aero Engines, Ld.; British Salmson Aero Engines, Ld. *v.* Commissioners of Inland Revenue
C. A. 482

6. —— —— *Profits or emoluments of office or employment taxable under Sch. E—Sum payable on termination of office—Office terminated by death—Assessment of executors in respect of terminal payment—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E—Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 45, *sub-ss.* 5, 6.
Allen and Another *v.* Trehearne (H.M. Inspector of Taxes) - **C. A. 464**

7. —— —— *Profits or gains of business—Agreement to pay 20 per cent. of net profits for services rendered—Admissible deduction in computing profits for income tax purposes—Additional assessments—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3 (*a*) *and* (*l*).
British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) - **C. A. 220**

REVENUE—*continued.*

8. —— —— *Retail company—Wholesale subsidiary companies—Absorption by holding company—Succession to business—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 11, *sub-r.* 2—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32.
Laycock *v.* Freeman Hardy & Willis, Ld. - - - - **Lawrence J. 836**

9. —— —— *Sur-tax—Avoidance of liability to taxation—Transfers of assets and associated operations — Whether effected "mainly for some purpose other than the "purpose of avoiding taxation"—Liability of executors to assessment—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18, *sub-ss.* 1, 7; *Sch. II., para.* 4—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 18.
Executors of W. S. Cottingham (Deceased) *v.* Commissioners of Inland Revenue - - - **Lawrence J. 689**

10. —— —— —— *Bearer bonds—Default in interest payments—Sale of coupons—Whether liable to tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV.*
Commissioners of Inland Revenue *v.* Paget. Paget *v.* Commissioners of Inland Revenue - - - - - **C. A. 25**

11. —— —— —— *Company—Dividend—Dividend paid "without deduction of income tax"—Whether equivalent to payment "free of tax"—Grossing-up dividend for purpose of sur-tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 39—*Finance Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 28), *s.* 7.
Commissioners of Inland Revenue *v.* Cull - - - - - **C. A. 109**

12. —— *Stamp Duty — Conveyance or Transfer on Sale—Scheme for Amalgamation of Companies—Forty-two per cent. of capital in existing company previously acquired for cash—Issue of unissued capital by transferee company to acquire further* 55 *per cent. of capital of existing company—Increase of capital "with a view to the acquisition of not "less than* 90 *per cent. of the issued share "capital of any particular existing company"—Stamp Act.* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 55—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-ss.* 1 (*b*), (*c*), (*ii.*), (*B*), 2.
Lever Brothers, Ld. *v.* Commissioners of Inland Revenue - - - **C. A. 518**

13. —— —— *Policy — Instrument securing payment of sum half-yearly in consideration of payment of lump sum—Annuity—Annuity by way of repayment—Annuity by way of sale—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 60, 87, *sub-s.* 2; *Sch. I.*
Commercial Union Assurance Co., Ld. *v.* Commissioners of Inland Revenue **Lawrence J. 551**

REVENUE SIDE—Of King's Bench Division—Subpœna—Service out of jurisdiction—Leave not obtained—Validity of proceedings - - **531**
See Practice **5.**

ROAD TRAFFIC — *Motor-cars — Collision—Cross-roads — Traffic lights — Driver crossing against red light—Negligence—Duty of driver crossing with green light—Contributory negligence — Highway code — Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 45, *sub-s.* 4—*Traffic Signs* (*Size, Colour and Type*) *Provisional Regulations,* 1933, *reg.* 28.
Joseph Eva, Ld. *v.* Reeves - **C. A. 393**

"ROLLED UP PLEA"—Of fair comment—In libel action—Particulars - **329**
See Practice **4.**

ROYALTIES—Consideration for licence to use patent—Income tax - **482**
See Revenue **5.**

RULES AND ORDERS:—

—— *Distress for Rent Rules,* 1920, *r.* 22: Day *v.* Davies - - **C. A. 74**

—— *Municipal Election Rules,* 1883, *r.* 38: *In re* Counter's Petition. Buckingham *v.* Counter **Div. Ct. & C. A. 90**

—— *Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions*) *Order in Council,* 1933 (*St. R. & O.* 1933, *No.* 1073): Yukon Consolidated Gold Corporation, Ld. *v.* Clark **C. A. 241**

—— *Rural District Councillors Election Rules,* 1934, *r.* 5, *sub-r.* 5: *In re* Counter's Petition. Buckingham *v.* Counter - **Div. Ct. & C. A. 90**

—— *Shipbuilding Regulations,* 1931, *Part II., reg.* 11 (*b*): Smith *v.* Cammell, Laird & Co., Ld. - - **C. A. 700**

—— *Supreme Court Rules, Order* xi., *rr.* 1, 11; *Order* lxviii., *r.* 3: Attorney-General *v.* Prossor **C. A. 531**

—— —— *Order* xxii., *r.* 6; *Order* xxx., *r.* 2; Sigley *v.* Hale and Another **C. A. 630**

—— —— *Order* liv., *r.* 23: Shoesmith, *In re* - - - - - **C. A. 637**

—— *Traffic Signs* (*Size, Colour and Type*) *Provisional Regulations,* 1933, *reg.* 28: Joseph Eva, Ld. *v.* Reeves **C. A. 393**

RURAL DISTRICT COUNCILLORS—Election of—Presentation of election petition—Time expiring on bank holiday—Presentation on following day—Whether in time - - **90**
See Local Government **6.**

SALE—Annuity whether by way of—Stamp duty - - - - - **551**
See Revenue **13.**

—— Of article in street—Prohibition of from stationary position—Sale from box-tricycle - - - - **198**
See Street Trading.

—— Of coupons on bearer bonds—On default of interest payments—Whether proceeds of sale liable to income tax - - - - **25**
See Revenue **10.**

SERVANT.
See Master and Servant.

SERVICE—Contract of—Between hospital and nurse—Injury to nurse in course of employment—Right to compensation - - - **768**
See Workmen's Compensation **3.**

SERVICE OUT OF JURISDICTION—Of writ of subpœna—Leave not obtained—Validity of proceedings - **531**
See Practice **5.**

SHIP—Staging in forehold—User of by insulation company doing work on ship—Whether a factory - **700**
See Factory.

SHIPPING — *Charterparty — Construction — Contract voyage — Deviation — Alternative route—Custom of trade—Evidence.*
Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co.
C. A. 730

2. ——— ——— ——— *Hire — Payment to be made monthly in advance—" Punctual and "regular payment"—Deadweight capacity—Hire to be calculated on tonnage—First monthly instalment of hire not paid on delivery of ship—Withdrawal of ship by shipowners—Shipowners' implied obligation to supply statement of ship's deadweight to charterers—No information to charterers as to deadweight—Withdrawal not justified.*
Kawasaki Kisen Kabushiki Kaisha *v.* Bantham Steamship Co., Ld. - **C. A. 790**

STAGING—Erection of in ship lying in dock—User of by insulation company doing work on ship—Whether a factory - - - - - **700**
See Factory.

STAMP DUTY.
See Revenue **12, 13.**

STATIONARY POSITION—Prohibition of sale from in street—Sale from box-tricycle - - - - - **198**
See Street Trading.

STATUTE—Debt created by—Claim for penalty under Income Tax Act **826**
See Revenue **4.**

STATUTES :—

1817.

57 Geo. 3, c. 93 (Distress (Costs)), s. 1: Day *v.* Davies - - **C. A. 74**

1827.

7 & 8 Geo. 4, c. 17 (Distress (Costs)): Day *v.* Davies - - **C. A. 74**

1831.

1 & 2 Will. 4, c. 37 (Truck), ss. 1, 3, 4, 23: Pratt *v.* Cook, Son & Co. (St. Paul's), Ld.
Wrottesley J. 51

1833.

3 & 4 Will. 4, c. 42 (Civil Procedure), s. 3: Pratt *v.* Cook, Son & Co. (St. Paul's), Ld.
Wrottesley J. 51

1845.

8 & 9 Vict. c. 109 (Gaming), s. 18: Poteliakhoff *v.* Teakle **C. A. 816**

1865.

28 & 29 Vict. c. 104 (Crown Suits, etc.), s. 37: Attorney-General *v.* Prossor - - - **C. A. 531**

1882.

45 & 46 Vict. c. 43 (Bills of Sale Act (1878) Amendment), ss. 7, 9, Schedule: Mitchener *v.* Equitable Investment Co., Ld. - **Lawrence J. 559**

45 & 46 Vict. c. 50 (Municipal Corporations), s. 100, sub-ss. 1, 2, 3: *In re* Counter's Petition. Buckingham *v.* Counter
C. A. 90

45 & 46 Vict. c. 61 (Bills of Exchange), ss. 8, 81: Hibernian Bank Ld. *v.* Gysin and Hanson **Lewis J. 384**

1884.

47 & 48 Vict. c. 70 (Municipal Elections (Corrupt and Illegal Practices)), s. 25, sub-s. 1 (as adapted and altered by the Rural District Councillors Election Rules, 1934 (St. R. & O. 1934, No. 546), r. 5, sub-r. 5), s. 30: *In re* Counter's Petition. Buckingham *v.* Counter
C. A. 90

1887.

50 & 51 Vict. c. 46 (Truck Amendment), s. 2: Pratt *v.* Cook, Son & Co. (St. Paul's), Ld.
Wrottesley J. 51

1888.

51 & 52 Vict. c. 21 (Law of Distress Amendment), s. 8: Day *v.* Davies
C. A. 74

51 & 52 Vict. c. 41 (Local Government), s. 62: Oxfordshire County Council *v.* Oxford City Council
C. A. 415

STATUTES—*continued.*

1889.

52 & 53 Vict. c. 45 (Factors), s. 1, sub-s. 1; s. 2, sub-s. 1: Lloyds Bank, Ld. *v.* Bank of America National Trust and Savings Association **C. A. 147**

1891.

54 & 55 Vict. c. 39 (Stamp), s. 55: Lever Brothers, Ld. *v.* Commissioners of Inland Revenue - **C. A. 518**

—— —— ss. 60, 87, sub-s. 2; Sch. I.: Commercial Union Assurance Co., Ld. *v.* Commissioners of Inland Revenue - - **Lawrence J. 551**

1892.

55 & 56 Vict. c. 57 (Private Street Works), ss. 7, 10, 15: Allen *v.* Hornchurch Urban District Council **Div. Ct. 654**

1894.

57 & 58 Vict. c. 30 (Finance), s. 7, sub-s. 1: *In re* Barnes (Deceased) **Lawrence J. 684**

1901.

1 Edw. 7, c. 22 (Factory and Workshop), ss. 79, 82, 104, sub-s. 1 (iii.); s. 149, sub-ss. 1, 2; s. 151; Sixth Schedule, Part II. (25.): Smith *v.* Cammell, Laird & Co., Ld. - **C. A. 700**

1906.

6 Edw. 7, c. 41 (Marine Insurance), s. 60, sub-s. 1, 2; s. 61: Petros M. Nomikos, Ld. *v.* Robertson **C. A. 603**

1911.

1 & 2 Geo. 5, c. 7 (Municipal Elections (Corrupt and Illegal Practices)), s. 1, sub-s. 1; s. 2: *In re* Counter's Petition. Buckingham *v.* Counter - - - **C. A. 90**

1 & 2 Geo. 5, c. 28 (Official Secrets), s. 2, sub-s. 1: Lewis *v.* Cattle **Div. Ct. 454**

1913.

2 & 3 Geo. 5, c. 19 (Local Government (Adjustments)), s. 1; Schedule, Part II. (1.), (2.), (3.): Oxfordshire County Council *v.* Oxford City Council - - **C. A. 415**

3 & 4 Geo. 5, c. 28 (Mental Deficiency), s. 11, sub-ss. 1, 2: The King *v.* The Board of Control. *Ex parte* Winterflood - - **C. A. 366**

1916.

6 & 7 Geo. 5, c. 50 (Larceny), ss. 1, 30: The King *v.* Bernhard **C.C.A. 264**

STATUTES—*continued.*

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), s. 30, sub-s. 1: Attorney-General *v.* Canter - **Lawrence J. 826**

—— —— Sch. A, No. I, r. i.; No. IV., r. 10; No. V., rr. 7, 8: House and Property Investment Co., Ld. *v.* Kneen (Inspector of Taxes) - **Lawrence J. 274**

—— —— Sch. D, Rules Applicable to Cases I. and II., r. 3 (*a*) and (*l*): British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) **C. A. 220**

—— —— Sch. D. Rules Applicable to Cases I. and II., r. 3 (*m*); All Schedules Rules, rr. 19, 21: Commissioners of Inland Revenue *v.* British Salmson Aero Engines, Ld. - - - - **C. A. 482**

—— —— Sch. D. Rules Applicable to Cases I. and II., rr. 6, 11: United Steel Cos., Ld. *v.* Cullington (Inspector of Taxes) - **566**

—— —— Sch. D, Cases I. and II., r. 11, sub-r. 2: Laycock (Inspector of Taxes) *v.* Freeman Hardy & Willis, Ld. **Lawrence J. 836**

—— —— Sch. D, Case IV.: Commissioners of Inland Revenue *v.* Paget. Paget *v.* Commissioners of Inland Revenue - **C. A. 25**

—— —— Sch. E. Allen and Another *v.* Trehearne - - **C. A. 464**

—— —— All Schedules, r. 18: Cottingham's Executors *v.* Commissioners of Inland Revenue **Lawrence J. 689**

—— —— All Schedules Rules, r. 20: Commissioners of Inland Revenue *v.* Cull - **C. A. 109**

1919.

9 & 10 Geo. 5, c. 73 (County Courts), s. 2: Culver *v.* Beard **C. A. 292*n*.**

1920.

10 & 11 Geo. 5, c. 81 (Administration of Justice), ss. 9, 14: Yukon Consolidated Gold Corporation, Ld. *v.* Clark - - - **C. A. 241**

1923.

13 & 14 Geo. 5, c. 9 (Agricultural Holdings), s. 12, sub-ss. 1, 6; *In re* Agricultural Holdings Act, 1923. Dunstan *v.* Benney and Others **C. A. 1**

STATUTES—*continued.*

1925.

15 & 16 Geo. 5, c. 49 (Supreme Court of Judicature (Consolidation)), s. 31, sub-s. 3: *In re* Shoesmith **C. A. 637**

15 & 16 Geo. 5, c. 71 (Public Health), s. 35: Allen *v.* Hornchurch Urban District Council - **Div. Ct. 654**

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 3: Wardell *v.* Kent County Council **C. A. 768**

—— —— s. 14, sub-s. i.; s. 43, sub-s. i. (*a*): Easterling *v.* Peek, Frean & Co., Ld. - **C. A. 300**

—— —— s. 30, sub-s. 2: Attorney-General *v.* Arthur Ryan Automobiles, Ld., and Arthur Stanley Ryan - - **C. A. 16**

—— —— s. 30, sub-s. 2: Shirvell *v.* Hackwood Estates Co., Ld **C. A. 577**

1926.

16 & 17 Geo. 5, c. 22 (Finance), s. 32: Laycock *v.* Freeman Hardy & Willis, Ld. - **Lawrence J. 836**

—— —— ss. 32, 33: United Steel Cos., Ld. *v.* Cullington (Inspector of Taxes) - **Lawrence J. 566**

1927.

17 & 18 Geo. 5, c. 10 (Finance), s. 39: Commissioners of Inland Revenue *v.* Cull - **C. A. 109**

—— —— s. 45, sub-ss. 5, 6: Allen and Another *v.* Trehearne **C. A. 464**

—— —— s. 55, sub-ss. 1 (*b*), (*c*), (ii.), (B), 2: Lever Brothers, Ld. *v.* Commissioners of Inland Revenue **C. A. 518**

17 & 18 Geo. 5, c. 21 (Moneylenders), s. 6: Mitchener *v.* Equitable Investment Co., Ld. - **Lawrence J. 559**

17 & 18 Geo. 5, c. xxii. (London County Council (General Powers)), s. 30: Taylor *v.* Townend **Div. Ct. 198**

1928.

18 & 19 Geo. 5, c. lxxxiv. (Oxford Extension), ss. 4, 5, 33, 61: Oxfordshire County Council *v.* Oxford City Council - - **C. A. 415**

1929.

19 & 20 Geo. 5, c. 17 (Local Government), s. 113, sub-ss. 1, 2; s. 117, sub-s. 4: Oxfordshire County Council *v.* Oxford City Council **C. A. 415**

STATUTES—*continued.*

1929.

19 & 20 Geo. 5, c. 23 (Companies), ss. 153, 154: United Steel Cos., Ld. *v.* Cullington - - **566**

1930.

20 & 21 Geo. 5, c. 23 (Mental Treatment), s. 16, sub-s. 1 (2.): *In re* Shoesmith **C. A. 637**

20 & 21 Geo. 5, c. 43 (Road Traffic), s. 35: Daniels *v.* Vaux **Humphreys J. 203**

—— —— s. 45, sub-s. 4: Joseph Eva, Ld. *v.* Reeves - - **C. A. 393**

1931.

21 & 22 Geo. 5, c. 28 (Finance), s. 7: Commissioners of Inland Revenue *v.* Cull - **C. A. 109**

1933.

23 Geo. 5, c. 13 (Foreign Judgments (Reciprocal Enforcement)), ss. 1, 2, 6, 7: Yukon Consolidated Gold Corporation *v.* Clark **C. A. 241**

23 & 24 Geo. 5, c. 51 (Local Government), s. 40, sub-ss. 1, 2; s. 295: *In re* Counter's Petition. Buckingham *v.* Counter - **C. A. 90**

1934.

24 & 25 Geo. 5, c. 41 (Law Reform (Miscellaneous Provisions)), s. 1: Attorney-General *v.* Canter **Lawrence J. 826**

24 & 25 Geo. 5, c. 50 (Road Traffic), s. 10, sub-ss. 1, 2, 3: Cross *v.* British Oak Insurance Co., Ld. **du Parcq J. 167**

24 & 25 Geo. 5, c. 53 (County Courts), s. 46: Phillips *v.* Lloyd & Sons, Ld. **C. A. 282**

1935.

25 Geo. 5, c. 8 (Unemployment Insurance), s. 3, Sch. I., Parts I., II.: *In re* The Unemployment Insurance Act, 1935 - - - **Branson J. 675**

25 & 26 Geo. 5, c. 30 (Law Reform (Married Women and Tortfeasors)), s. 6: Sigley *v.* Hale and Another. Wilson, Third Party - **C. A. 630**

—— —— s. 6, sub-s. 2: Daniel *v.* Rickett, Cockerell & Co., Ld., and Raymond - **Hilbery J. 322**

1936.

26 Geo. 5 & 1 Edw. 8, c. 13 (Unemployment Insurance (Agriculture) Act, 1936), s. 1: *In re* The Unemployment Insurance Act, 1935 **Branson J. 675**

STATUTES—*continued.*

1936.

26 Geo. 5 & 1 Edw. 8, c. 34 (Finance), s. 18, sub-ss. 1 and 7; Sch. II., para. 4: COTTINGHAM'S EXECUTORS *v.* COMMISSIONERS OF INLAND REVENUE **Lawrence J. 689**

26 Geo. 5 & 1 Edw. 8, c. 51 (Housing), ss. 11, 15, 188, sub-s. 1: TRIM *v.* STURMINSTER RURAL DISTRICT COUNCIL - - - **C. A. 508**

—— —— ss. 25, 26, Sch. III., para. 2: *In re* BUTLER. CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936 **du Parcq J. 210**

STREET TRADING—*Sale of ice-cream from box-tricycle—Sale from stationary position—London County Council (General Powers) Act*, 1927 (17 *&* 18 *Geo.* 5, *c. xxii.*), *s.* 30. TAYLOR *v.* TOWNEND - - **Div. Ct. 198**

SUBPŒNA—Writ of—Service out of jurisdiction—Leave not obtained—Validity of proceedings - - **531**
See PRACTICE **5.**

SUCCESSION—To business—Assignment to retail company of subsidiary wholesale company—Income tax - **836**
See REVENUE **8.**

SURTAX.
See REVENUE **9, 10, 11.**

SURVEYOR OF TAXES—Change of opinion by—As to deduction from profits for income purposes — Whether ground for additional assessment
See REVENUE **7.** **220**

SURVIVAL—Of cause of action for penalty under Income Tax Act—Against estate of deceased person—Claim for penalty not an action in tort **826**
See REVENUE **4.**

TAX—Government duty.
See REVENUE.

TENANT.
See LANDLORD AND TENANT.

THIRD-PARTY NOTICE—By one of two defendants to the other claiming contribution—Jurisdiction of Court to make order that either defendant make offer to the other on percentage basis - - - - - **630**
See PRACTICE **1.**

THIRD-PARTY PROCEEDINGS — Between joint tortfeasors—For indemnity or contribution - - - - **322**
See NEGLIGENCE.

THIRD-PARTY RISKS—Under motor policy —Accident involving three persons —Action by one against insured—Counterclaim by third party against insured—No notice of counterclaim to insurer—Judgment for third party on counterclaim—Claim by third party against insurer — Competence - - - **167**
See INSURANCE (MOTOR) **1.**

—— —— Gift or loan of car by registered owner — Lapsed policy — Owner's liability - - - - - **203**
See INSURANCE (MOTOR) **2.**

TIME—For presentation of election petition —Time expiring on bank holiday—Presentation on following day—Whether valid - - - **90**
See LOCAL GOVERNMENT **6.**

—— Limitation of.
See LIMITATION OF TIME.

TONNAGE—Of ship—Provision in charterparty that hire be calculated upon —Implied obligation on shipowner to supply statement of ship's deadweight - - - - **790**
See SHIPPING **2.**

TORT—Action for—Commencement in High Court—Application for transfer to county court—Discretion **282, 292*n*.**
See PRACTICE **2, 3.**

—— Claim for penalty under Income Tax Act not an action in—But a statutory debt - - - **826**
See REVENUE **4.**

TORTFEASOR.
See JOINT TORTFEASORS.

TOTAL LOSS—Of steamer.
See CONSTRUCTIVE TOTAL LOSS.

TRADE CUSTOM.
See CUSTOM OF TRADE.

TRADING IN STREET.
See STREET TRADING.

TRAFFIC LIGHTS—Collision between motorcars at cross-roads—Driver crossing against red light — Negligence — Driver crossing at right angles with green light—Whether contributory negligence - - - - **393**
See ROAD TRAFFIC.

TRANSFER—Of action of tort from High Court to county court—Application for—Discretion - - **282, 292*n*.**
See PRACTICE **2, 3.**

—— Of assets to colony—For avoidance of sur-tax—Liability of executors to assessment - - - - **689**
See REVENUE **9.**

TRANSFER—*continued.*

—— Of bill of exchange—Prohibition of—Crossing "not negotiable" - **384**
See Bill of Exchange.

—— Of districts from county to city—Act extending boundary of city—Subsequent Act making county council the local authority for certain purposes — Increased burden on county ratepayers—Whether due to extension Act or subsequent Act **415**
See Local Government **1.**

—— On sale—Issue of capital by transferee company to acquire by exchange further capital of existing company—Stamp - - - - **518**
See Revenue **12.**

TREE—On landlord's land—Fall of branch upon tenant's adjoining land—Fatal accident—Which party liable to bear compensation - - **577**
See Landlord and Tenant **2.**

UNEMPLOYMENT INSURANCE.
See Insurance (Unemployment).

VALUER—Fee paid to by tenant of agricultural holding—To disprove allegation that he was not cultivating properly—Whether expense reasonably incurred by tenant in claim for compensation - - - **1**
See Landlord and Tenant **1.**

VOYAGE—Chartered voyage between two ports—Deviation from direct route—Custom of trade - - - **730**
See Shipping **1.**

WAGES — Of manual worker — Deduction from for food—Illegality - - **51**
See Master and Servant **2.**

WALKING POSSESSION — Under agreement between bailiff and distrainee — Charges paid by distrainee—Claim by distrainee for return of money paid—Validity of charges - **74**
See Distress.

WEAR AND TEAR—Deduction from taxable income—On amalgamation of companies—Right to carry forward **566**
See Revenue **2.**

WIFE.
See Husband and Wife.

WORDS :—

—— "Annuity": Commercial Union Assurance Co., Ld. *v.* Commissioners of Inland Revenue **Lawrence J. 551**

—— "Appurtenance": Trim *v.* Sturminster Rural District Council **C. A. 508**

WORDS—*continued.*

—— "Capital" (lump sum payable as consideration for licence to use patent): Inland Revenue Commissioners *v.* British Salmson Aero Engines, Ld. - **C. A. 482**

—— "Claim of right": The King *v.* Bernhard - - **C. C. A. 264**

—— "Common employment": Radcliffe *v.* Ribble Motor Services, Ld. **C. A. 345**

—— "Constructive total loss": Petros M. Nomikos, Ld. *v.* Robertson **C. A. 603**

—— "Decision on the merits" (Order of quarter sessions quashing affiliation order for insufficiency of corroborative evidence): Rex *v.* Howard - - **Div. Ct. 544**

—— "Deviation" (from chartered voyage): Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. - - **C. A. 730**

—— "Expenses reasonably incurred": Dunstan *v.* Benney - **C. A. 1**

—— "Factory": Smith *v.* Cammell, Laird & Co. - - - - **C. A. 700**

—— "House": *In re* Butler **du Parcq J. 210**

—— "House": Trim *v.* Sturminster Rural District Council **C. A. 508**

—— "Income": Inland Revenue Commissioners *v.* Paget - **C. A. 25**

—— "Income" (royalties payable as consideration for licence to use patent): Inland Revenue Commissioners *v.* British Salmson Aero Engine, Ld. - - - - **C. A. 482**

—— "Just and equitable": Daniel *v.* Rickett, Cockerell & Co., Ld., and Raymond - **Hilbery J. 322**

—— "Mercantile agent": Lloyds Bank, Ld. *v.* Bank of America National Trust and Savings Association **C. A. 147**

—— "Money wholly or exclusively laid "out or expended for the purposes "of the trade": British Sugar Manufacturers, Ld. *v.* Harris (Inspector of Taxes) **C. A. 220**

—— "Not negotiable": Hibernian Bank, Ld. *v.* Gysin and Hanson **Lewis J. 384**

—— "Occupier of a factory": Smith *v.* Cammell, Laird & Co. **C.. A. 700**

WORDS—*continued.*

—— " Owner ": Lloyds Bank, Ld. *v.* Bank of America National Trust and Savings Association **C. A. 147**

—— " Person who holds office under His " Majesty " (police officer): Lewis *v.* Cattle - - **Div. Ct. 454**

—— " Proceedings in which the judgment " was given ": Cross *v.* British Oak Insurance Co. **du Parcq J. 167**

—— " Reasonable cause ": Easterling *v.* Peek, Frean & Co., Ld. **C. A. 300**

—— " Res judicata ": Attorney-General *v.* Arthur Ryan Automobiles, Ld. **C. A. 16**

—— " Succeeding " (to business): Laycock *v.* Freeman Hardy & Willis, Ld. **Lawrence J. 836**

—— " Without deduction of income tax ": Commissioners of Inland Revenue *v.* Cull - **C. A. 109**

—— " Workman " (Hospital nurse): Wardell *v.* Kent County Council **Lawrence J. 768**

WORKING CLASSES—House whether suitable for occupation by—Whether fit for human habitation—Demolition order - - - - **508**
See Local Government.

WORKMEN'S COMPENSATION—*Industrial disease—Failure to claim compensation within six months of the disablement—Certificate of certifying surgeon dated after expiration of six months — Reasonable cause — Certificate necessary before any claim possible—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 14, *sub-s.* 1; *s.* 43, *sub-s.* 1 (*a*).
Easterling *v.* Peek, Frean & Co., Ld. **C. A. 300**

2. —— *Injury to workman in course of employment—Employers' right to indemnity from third party for compensation paid to workman—Right to further indemnity for further compensation paid—Money paid into Court with a denial of liability—Plea of res judicata—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 30, *sub-s.* 2.
Attorney-General *v.* Arthur Ryan Automobiles, Ld., and Arthur Stanley Ryan - - - - - - **C. A. 16**

3. —— —— *" Workman " — Nurse employed in hospital—Preparation of antiphlogistine poultice for patient—Directions given by sister in charge of ward—Explosion of preparation—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 3.
Wardell *v.* Kent County Council **C. A. 768**

—— Servant of tenant killed by fall of branch from tree growing on landlord's adjoining land—Compensation paid by tenant to dependant of servant—Right of tenant to indemnity from landlord - - **577**
See Landlord and Tenant **2.**

WRIT OF SUBPŒNA.
See Subpœna.

BIBL.
LONDIN.
UNIV.

PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C.2.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

KING'S BENCH DIVISION AND PROBATE DIVISION.

(Including Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1938.—Vol. II. K.B. & P.

2 K.B. (p. 1 to p. 219): P. (p. 69 to p. 116).

Part VI.—June 1.

TABLE OF CASES.

KING'S BENCH DIVISION.

PAGE

Agricultural Holdings Act, 1923, *In re.* Dunstan *v.* Benney .. C. A. 1
Associated Distributors, Ld. *v.* Hall .. .. C. A. 83
Attorney-General *v.* Arthur Ryan Automobiles, Ld. .. .. C. A. 16
Banco de Bilbao *v.* Sancha. Same *v.* Rey .. .. C. A. 176
Butler, *In re.* Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 210
Counter's Petition, *In re.* Buckingham *v.* Counter .. .. C. A. 90
Cross *v.* British Oak Insurance Co., Ld. 167
Daniels *v.* Vaux 203
Day *v.* Davies .. .. C. A. 74
Dunstan *v.* Benney. *In re* Agricultural Holdings Act, 1923 .. C. A. 1
Inland Revenue Commissioners *v.* Cull .. .. C. A. 109
Inland Revenue Commissioners *v.* Paget .. .. C. A. 25
Lloyds Bank, Ld. *v.* Bank of America National Trust and Savings Association .. .. C. A. 147
Paget *v.* Inland Revenue Commissioners .. .. C. A. 25
Pratt *v.* Cook, Son & Co. (St. Paul's), Ld. 51
Taylor *v.* Townend 198

PROBATE DIVISION.

Beattie *v.* Beattie 99
Chapman *v.* Chapman and Thomas 93
Goldie *v.* Adam 85
Gower *v.* Gower 106
Stranna (The) .. .. C. A. 69
Terneuzen (The) 109

For Mode of Citation, see Beginning of Index.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

Printed by WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C. 2.

"THE LAW REPORTS, 1938," for June consist of—

Chancery Division	Part VI.
King's Bench and Probate Divisions	Part VI.
Appeal Cases	Part III.

EDITOR—A. F. TOPHAM, ESQ., K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { W. IVIMEY COOK, R. F. STUBBING, } *Barristers-at-Law.*

REPORTERS:

House of Lords	J. S. HENDERSON,	*Barrister-at-Law.*
Privy Council	CHARLES CLAYTON,	*Barrister-at-Law.*
Court of Appeal, No. 1	W. IVIMEY COOK, H. C. GARSIA,	*Barristers-at-Law.*
Court of Appeal, No. 2	R. F. STUBBING, J. RITCHIE,	*Barristers-at-Law.*
Chancery Division	P. J. BOLAND, J. L. DENISON, H. LANGFORD LEWIS, A. R. LLEWELLIN-TAYLOUR, K. R. A. HART,	*Barristers-at-Law.*
King's Bench Court of Criminal Appeal, and Railway and Canal Commission Cases	W. L. L. BELL, F. PORTER FAUSSET, G. F. L. BRIDGMAN, T. W. MORGAN, J. W. HALL, A. W. GRANT,	*Barristers-at-Law.*
Probate and Divorce	WM. LATEY,	*Barrister-at-Law.*
Admiralty Cases	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases	W. L. L. BELL,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

The Law Reports 1938.

The Entire Series, Unbound. Thick or Thin-paper Editions.

(with which are presented the Statutes, Weekly Notes, and Complete Current Digest).

SUBSCRIPTION, £5 15s. 0d.

No issues of the publications will be delivered until the subscription has been paid.

All sums payable to the Council must be prepaid.

Cheques and Money Orders should be remitted direct to the Secretary and should be made payable to the "Council of Law Reporting" and crossed.

Banker's Commission must be added to the amount of the Subscription in the case of every remittance from Ireland, Scotland, the Isle of Man, and the Channel Islands. Remittances from abroad must be made payable in London.

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C. 1,

except those in reference to *Reports of Cases*, which should be addressed to the Editor, A. F. Topham, Esq., K.C., 5, New Square, Lincoln's Inn, W.C.2.

PRICES OF OTHER PUBLICATIONS OF THE COUNCIL.

	£	s.	d.
COMPLETE CURRENT DIGEST, 1938 (a Digest, issued quarterly, of all reported cases) (unbound)	1	1	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	4	4	0
DECENNIAL DIGEST, 1891-1900 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1901-1910 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth)	4	4	0
DECENNIAL DIGEST, 1921-1930 (ditto) (in cloth)	4	4	0
WEEKLY NOTES, 1938 (unbound)	1	10	0
INDIAN APPEALS, 1938 (unbound)	1	1	0
INDIAN APPEALS DIGEST, 1872-1923 (in cloth)	2	2	0

The back Years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1930, may be obtained on application to the Secretary. The *Weekly Notes*, 1891-1930, and the *Law Reports*, 1918-1920, are out of print. The Council have a limited number of unbound copies of the *Law Reports*, 1891-1916, which they are prepared to sell at reduced prices. A further reduction would be made to purchasers who require the *Law Reports* for several consecutive years between 1890 and 1917.

BINDING.

The Council are the only official binders of their publications, and they employ no agents in their binding business. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

LAW REPORTS.

	Ordinary Edition. s.	d.	Thin Edition. s.	d.	
Cloth	5	3	6	9	per Vol.
Buckram ..	6	9	8	6	"
Half-Calf ..	8	0	9	9	"
Half-Morocco ..	9	9	11	3	"
Calf	11	6	13	3	"
Full Morocco (Limp)	—		17	6	"

WEEKLY NOTES.

	Notes of Cases. s.	d.	Notes of Cases and Miscellaneous. s.	d.
Cloth	5	9	6	0
Buckram	8	0	8	6
Half-Calf	10	0	10	6
Half-Morocco ..	10	9	11	0
Calf	14	0	15	0

The *Law Reports* and *Statutes* for 1937 consist of 6 Volumes. In the thin-paper edition these may be bound as 4 Volumes.

Unbound parts should be sent, carriage paid, to 30, Montague Street, London, W.C. 1, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made. Unbound parts will be collected, upon request, within a two-mile area of the Law Courts, free of charge.

When the Subscriber's address is not more than two miles from the Law Courts no charge will be made for the cost of carriage of bound volumes for the year, beyond that distance but within the London Area 1s. 9d., outside that area but within the United Kingdom (including Northern Ireland) 3s. (Thin Edition 1s. 9d.), and in the Colonies or abroad the full cost will be charged.

Two Important New Works

BROOKS
ON
MATRIMONIAL CAUSES
2nd Edition, 1938

with

The Matrimonial Causes Rules, 1937, annotated

by

LESLIE BROOKS, B.A.

of the Middle Temple and Western Circuit, Barrister-at-Law.

Price 10s. 6d. ***Postage 6d.***

In this new edition full consideration has been given to the far-reaching effect of the new Rules, and besides numerous other additions and revisions an entirely new section has been added on

POOR PERSONS PROCEDURE

REES'
PROBATE AND DIVORCE HANDBOOK

by

D. PERRONET REES

of the Principal Probate and Divorce Registry.

1938

This new work contains the various rules of practice as regards non-contentious Probate and Divorce. Full tables of Fees and Bills of Costs are given and a wide selection of Forms. It is produced as a handbook which can easily be carried in the pocket to settle any difficulties as they arise.

Price 15s. ***Postage 6d.***

BUTTERWORTH & CO. (Publishers) LTD.
BELL YARD, TEMPLE BAR, LONDON, W.C.2.